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A  
MANUAL  
OF  
EQUITY JURISPRUDENCE,  
FOR  
PRACTITIONERS AND STUDENTS,

FOUNDED ON THE WORKS OF  
STORY, SPENCE, AND OTHER WRITERS,  
AND ON  
MORE THAN A THOUSAND SUBSEQUENT CASES:

COMPRISING  
*The Fundamental Principles,*  
AND  
*The Points of Equity usually occurring  
in General Practice.*

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By JOSIAH W. SMITH, B.C.L., Q.C.,

RETIRED JUDGE OF COUNTY COURTS, AND A BENCHER OF LINCOLN'S-INN.  
EDITOR OF "FEARNE'S CONTINGENT REMAINDERS," AND MITFORD'S "CHANCERY  
PLEADINGS," AUTHOR OF "A COMPENDIUM OF THE LAW OF REAL AND  
PERSONAL PROPERTY," "A MANUAL OF COMMON LAW," AND "A  
MANUAL OF BANKRUPTCY;" AND ONE OF THE CONSOLI-  
DATORS OF THE CHANCERY ORDERS.

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THIRTEENTH EDITION



LONDON:  
STEVENS & SONS, 119, CHANCERY LANE.  
Law Publishers and Booksellers.

1880.



TO  
THE RIGHT HONOURABLE  
SIR JAMES LEWIS KNIGHT BRUCE,  
ONE OF THE LORDS JUSTICES  
OF THE COURT OF APPEAL IN CHANCERY,  
THIS HUMBLE ATTEMPT  
TO FACILITATE A KNOWLEDGE OF THAT JURISPRUDENCE  
WHICH HAD BEEN ADMINISTERED BY HIS LORDSHIP  
SO LONG, SO ABLY, AND SO CONSCIENTIOUSLY,  
WAS,  
BY PERMISSION,  
MOST RESPECTFULLY INSCRIBED.



## PREFACE

### TO THE THIRTEENTH EDITION.

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FOR this, as for the fifth and subsequent editions, the writer has searched the authorised Reports published since the preceding edition, and has added such further points to be found in those Reports as appeared to him to be requisite to be noticed in a book of this kind, as well as references to new cases in support of points previously inserted, and references to the new Statutes.\*

This edition comprises more than a thousand cases, coming within the scope of the Manual, which have been decided since the death of Mr. Justice Story and of Mr. Spence, together with a few earlier cases. For the rest of the earlier cases, the reader is referred, as before, to the works of Story, Spence, and other writers, on which the Manual purports to be founded.

\* His very learned friend, Mr. O. D. Tudor, the Author of the "Leading Cases in Equity" (now in the 5th edition), and of other well-known and highly valuable works, kindly perused the proof sheets of the eighth edition of this Manual.

The "Act to confer on the County Courts a Limited Jurisdiction in Equity" (28 & 29 Vict. c. 99), called for no notice in the present work, as it merely gave those Courts the power of administering a large portion of Equity Jurisprudence, without affecting any part of that Jurisprudence at all.

It is obvious that the book must now be as applicable and useful in Equity cases in the County Courts, as elsewhere.

As to the alterations made by the Judicature Acts, the reader is referred to page 11, *infra*.

J. W. S.

*April*, 1880.

## PREFACE

### TO THE THIRD EDITION.

---

THIS edition is founded on the learned and very valuable Treatise on "The Equitable Jurisdiction of the Court of Chancery," by the late George Spence, Esq., Q.C., as well as on the celebrated work on which the preceding editions were founded.

The second volume of Mr. Spence's work (published in the year 1849) contains upwards of 900 pages of Equity Jurisprudence, of which the writer of the Manual has, in this edition, availed himself in the same way as he had previously made use of the work of Mr. Justice Story.



## PREFACE

### TO THE SECOND EDITION.

---

THE writer of these pages, in publishing the first edition, was under no apprehension that a work answering to the title of the present little book would be deemed *unnecessary*. On the contrary, he was not aware of the existence of any book purporting to give a succinct yet comprehensive view of the leading principles of Equity Jurisprudence; and he believed that the want of a book of that description was greatly felt by students, and indeed by many practitioners in each branch of the profession. For, the student labours under great disadvantages, when he enters upon the perusal of a large Treatise without having previously read any smaller work upon the same subject; and after he has read a work of two volumes, he is able accurately to retain but few points in his memory—far fewer than he would after a careful perusal of a condensed work. And the practitioner often stands in need of a body of points and principles, well fixed in his mind, as his constant guide and

aid amidst the rapid occasions of daily practice : and yet it is impossible for him to become possessed of such a body of knowledge, except by the help of some succinct view of Equity, or by the experience gained during long and extensive practice.

The Manual is founded on the "Commentaries on Equity Jurisprudence" of the late Joseph Story, LL.D., one of the Justices of the Supreme Court of the United States ; and it is of a *semi-original character, bearing the same relation to the Commentaries, as the Commentaries bear to the treatises and reports on which they are founded.* The division of the subject is original. And although many passages are mere extracts, yet the selection of such passages as expressed in the fewest words the pith of whole sections, or that view of a subject which seemed to be the more correct, involved considerable deliberation and discrimination. And, taking the Manual as a whole, there has been the same process of analysing, arranging, digesting, defining, distinguishing, deducing, qualifying, and commenting, as in the generality of legal treatises ; and the reader will scarcely suppose the amount of close consideration which has been bestowed upon so small a book.

As the learned judge seems to have availed himself of most of the treatises, as well as of the reports, in the composition of his Commentaries,

there appeared to be no necessity, in general, for the writer's consulting other works besides the Commentaries, while engaged upon the Manual, unless he had designed to enter more into detail. At the same time he has written under the light derived from the previous perusal of other works. And he has noticed several recent enactments, which, as not applicable to America, the learned Judge has omitted.

With regard to the principle of selection, the writer has endeavoured to collect together, under appropriate heads, the points usually occurring, and necessary to be accurately known, and constantly borne in mind by every Chancery and Conveyancing Counsel, and by every Solicitor; and for that purpose he has laboured to extract, and mould into a concise and perspicuous form the essence of the Commentaries, which comprise upwards of 1,700 pages; omitting points of law in some instances, and such cases in Equity as are of a peculiar nature and not likely to occur again; and also omitting, except where it seemed advisable to use them as examples, such cases as are of so simple and obvious a character, that the decisions respecting them embody nothing more than so plain and necessary an application of points and principles stated in the work, that it would be sure to suggest itself at once, without variation, to the minds of different individuals.

A host of English treatises and cases are cited by the learned Judge and Author, exclusively of the American decisions. The points comprised in the following pages are those in support of which English authorities are cited.

The want of references to the authorities themselves, may seem, at first sight, to be a strong ground of objection, in the eyes of those who do not possess the Commentaries. But, in reality, it is not so. For the insertion of those references would have doubled the bulk and price of the Manual; and it is rarely necessary or advisable for the student to consume his time by referring to the authorities: and with respect to those who are engaged in practice, the earlier editions of the Commentaries contain almost all the sections referred to in these pages, numbered in the same manner; although the last, that is, the fourth edition, is the edition of the Commentaries from which the present edition of the Manual has been prepared for the press.

The writer has generally prefixed the word "see" to the references, where he has interspersed original matter, or has modified, in point of substance, the statements he has taken from the Commentaries, with reference to cases contained in other passages, or otherwise; or where he has deduced, rather than abstracted, the points from a passage in the Commentaries; or where he has

blended together for the sake of brevity, precision, or otherwise, the ideas contained in two or more passages, or where he has expressed his own views, or has laid down original propositions, but has referred to passages in the Commentaries in support of such views or propositions. For those paragraphs to which no reference is added, he alone is responsible.

J. W. S.

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(a) This comprises more than 1080 cases from the authorised Reports published during the last twenty-five years, with a few earlier cases. For the rest of the earlier cases the reader is referred to the works of STORY, SPENCE, and others, on which this Manual purports to be founded.

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- Par. 83, after 3 Ch. D., add (Ap.).
- 160, line 8 from end, after 8 Ch. D., add (Ap.).
  - 168, last line, after 8 Ch., add Ap.
  - 298a, after 10 Ch. D., add (Ap.).
  - 359, last line, after 8 Ch. D., add (Ap.).
  - 485, end of page 311, add to s. 1, *In re Rossiter*, L. R. 13 Ch. D. 355.
  - 555, line 7 from end, after 6 Ch. D., add (Ap.).
  - 572a, after 11 Ch. D., add (Ap.).
  - 674, line 5, add *The Protector Endowment, &c., Company v. Grice*, L. R. 5 Q. B. D. 121.
  - 782, add *Drover v. Beyer*, L. R. 13 Ch. D. (Ap.) 242.

A

MANUAL

OF

EQUITY JURISPRUDENCE.

---

INTRODUCTION.

SECTION I.

*Of the Nature of Equity Jurisprudence, and  
the Extent of Equity Jurisdiction.*

To explain the true nature of Equity Jurisprudence with brevity, perspicuity, and accurate precision, is a task of great difficulty (see Story's Com. Ch. I. *passim*), on account of the mixed character of the science, and the immense extent of learning which for this purpose it is necessary for the mind to survey at one and the same time. It is most important, however, that some attempt be made to accomplish this, before the reader's

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Difficulty  
and import-  
ance of the  
inquiry.

B

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attention is directed to the particular doctrines of the vast system the principal features of which it is the design of these pages to delineate. 1.

**Definition of  
equity juris-  
prudence.**

The writer believes it is impossible to give a short definition of Equity Jurisprudence, without either failing to convey any accurate and definite knowledge, or else positively misleading the student. But Equity Jurisprudence, in the specific and technical sense of the term, as contradistinguished from natural, abstract, and universal Equity, and from Law and the Statutory Jurisprudence of the Courts, may be described to be a portion of justice, or natural equity, not embodied in legislative enactments or in the rules of the Common Law, yet modified by a due regard thereto, and to the complex relations and convenience of an artificial state of society, and administered in regard to cases where the particular rights in respect whereof relief is sought come within some general class of rights enforced at Law, or may be enforced without detriment or inconvenience to the community, but where, as to such particular rights, the Courts of Law could not, or originally did not, clearly afford any relief or adequate relief, at least not without circuity of action or multiplicity of suits, or

did not make such restrictions, adjustments, compensations, qualifications, or conditions, as might be necessary in order to take due care of the rights of all who were interested in the property in litigation. Although there may possibly be some peculiar cases which may at first sight be thought to prove this description to be faulty, yet it will probably appear, on closer consideration, that such cases (if any such there are) are not to be regarded as illustrative of the general character of Equity Jurisprudence; and it will probably be found, and the following observations may tend to show, that such description conveys a just notion of the true nature of that science. **2.**

I. In the most general sense, Equity is synonymous with natural justice. (See St. § 1, 2.) But Equity, as contradistinguished from Law, and as administered in our Courts of Equity, has a much narrower and an otherwise different signification. Many matters of natural justice, by the Equity Jurisprudence of this and every other civilized nation, are left to be disposed of *in foro conscientiae*, from the difficulty of framing any general rules to meet them, and from the mischief and inconvenience which would arise from attempting judi-

Equity jurisprudence is not synonymous with natural justice.



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cially to enforce such duties as charity, gratitude, and kindness, or even positive engagements, where they are not founded on a valuable consideration, or, at least, on what is deemed a good consideration. (See St. § 2, 8, note, and § 14; 1 Sp. 447, n. (d).) **3.**

And, on the other hand, setting aside that body of natural justice which is comprised in statutory provisions, a vast proportion of what is specifically denominated Law (as contradistinguished from what is technically designated Equity) has been reared up independently of legislative enactments or arbitrary or conventional rules, and consists, in the main, of a system of natural equity or justice, modified so as to be adapted to the manifold and complicated relations and exigencies of a highly artificial state of society. (See St. § 7, 8, notes, and § 20, 34.) And as to the construction of statutes, a Court of Law is bound to interpret them according to the intention of the legislature, as much as a Court of Equity : indeed, both adopt the same principles of interpretation. (See St. § 15.) **4.**

So that, on the one hand, natural justice or equity was not excluded from the system of Law ; nor, on the other hand, is it carried

out to an unlimited extent even in a Court of Equity. And in the cases to which it is applied in a Court of Equity, it is not always applied in an unmodified form, but is qualified (as we shall see in the third section and in subsequent pages) by a due regard to legislative enactments and the rules of the Common Law, and to the varied and complicated relations and the general convenience of the subsisting order of things. **5.**

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The truth, then, appears to be this : first, that a large portion of natural equity is left to be administered *in foro conscientiae* ; because, in addition to the difficulty of propounding precise rules, applicable to all cases, a greater detriment and inconvenience to the community would probably ensue from attempting to enforce it in the public Courts, than from leaving it to the decision and the power of conscience, and to the various motives by which mankind are ordinarily influenced. Secondly, that another large portion of natural equity was always administered by the Courts of Law, and is denominated Law, in contradistinction to what is technically termed Equity.

A large portion of natural justice is left to conscience.

Another large portion was always administered in Courts of Law.

And, thirdly, only a portion, therefore, of natural equity, and that in a modified form, is administered in a Court of Equity ; and

That which is administered in Courts of Equity is therefore

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only a portion of natural justice, and in a modified form.

that portion is specifically and technically called Equity, in contradistinction as well to the two other portions of equity, or to natural, abstract, and universal equity or justice in general, as to legislative enactments, and arbitrary, feudal, or simply conventional rules. 6.

Where there is no remedy at Law, and Equity had exclusive jurisdiction.

II. 1. There were particular rights which came within some general class of rights enforced at Law, or capable of being judicially enforced, not only in particular instances, and to the benefit of particular individuals, but in all cases, and to the advantage of the community at large; and yet there were no forms of action by which relief could be obtained in respect of such particular rights, and they were consequently left to conscience by the Courts of Law; but being capable of being enforced by proceedings in Equity, and being of a character demanding judicial sanction and interposition, Courts of Equity readily interfered and afforded relief. In these cases, therefore, Courts of Equity had exclusive jurisdiction. This, for example, was the case with trusts, for the most part; with the right to relief in many instances of accident, mistake, fraud, penalties, and forfeitures; and, in most cases, with the right to protection

against anticipated loss or injury. (See St. **INTROD.**  
§ 29, 962.) **7.** **SEC. I.**

2. There were many other cases, in which the kind of relief which was afforded by Courts of Law was inadequate, but in which Courts of Equity could give the precisely appropriate relief. For example, Equity would often enforce the specific performance of a contract ; whereas Courts of Law could only give damages for the breach thereof. (See St. § 30, 33.) **8.**

Where Equity assumed jurisdiction on account of the inadequacy of the legal relief :

There were also cases in which adequate and complete relief could be had at Law, but in order to obtain it, circuity of action or multiplicity of suits was necessary ; whereas complete justice could be done by a single suit in Equity. (See St. § 64 k, 496, 621, 853, 854.) **9.**

or to avoid circuity of action, or multiplicity of suits :

Again : Courts of Law could not do more than pronounce a positive judgment in a settled form, either for the plaintiff or the defendant, irrespective of the peculiar circumstances of the case ; whereas Courts of Equity could adapt their decrees to all the various circumstances which might arise, and could take due care of the rights of all who were in any way interested in the property in litigation. (See St. § 26-28, 437.) **10.**

or to take due care of the rights of all

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In these three classes of cases, Equity had a concurrent and practically an exclusive jurisdiction. Indeed, in some, if not in all of the last class of these cases, Equity used to assert an exclusive jurisdiction, by granting an injunction against proceedings in other Courts. (See Title II. Chap. I., *infra*.) **11.**

or on  
account of  
the neces-  
sity for a  
discovery ;

The necessity for a discovery in a Court of Equity furnished a ground of jurisdiction for relief in a great variety of cases. For the Court, having acquired cognizance of the suit for the purpose of discovery, would frequently entertain it for the purpose of relief. (St. § 691, 692.) **12.**

or on  
account of  
the original  
denial of  
due relief at  
Law ;

And in cases where the Courts of Law originally did not afford adequate relief, Courts of Equity exercised a concurrent jurisdiction, unless prevented by a legislative enactment, even though the Courts of Law subsequently gave such relief. For, they could have no power to circumscribe the jurisdiction of Courts of Equity. (See St. § 64 i, 81; 2 Sp. 16.) **13.**

or the  
doubtful-  
ness of  
obtaining  
such relief.

And so if it was doubtful whether the Courts of Law could give such relief, the Courts of Equity had jurisdiction. **14.**

Where  
Equity had  
auxiliary  
jurisdiction.

3. In some cases a matter was most properly cognizable at Law, and Courts of Law

could always have afforded due relief, had they possessed that evidence which a Court of Equity could obtain, but which a Court of Law formerly could not obtain. In these cases Courts of Equity used to have an auxiliary jurisdiction to provide the Courts of Law with that evidence. (See St. § 64 k, 673.) **15.**

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4. Where it was clear that the Courts of Law could always afford adequate relief without the aid of Courts of Equity, and without circuitry of action or multiplicity of suits, and could take due care of the rights of all who were interested in the property in controversy, Equity had no jurisdiction. (See St. § 33, 684 a & c, 686; 1 Sp. 408, 420; 2 Sp. 16.) **16.**

Where it  
had no  
jurisdiction.

And Courts of Law and Equity are in general alike ousted in the case of internal disputes between the members of a building or other friendly society and the society itself, or any of the officials of the society and the society itself, where the Act of Parliament under which it is constituted, or the Friendly Societies Act, provides that such disputes shall be settled by arbitration. (*Thompson v. Planet Benefit Building Society*, L. R. 15 Eq. 333.) **17.**

Nor, as already observed, have Courts of

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Equity any jurisdiction as to those classes of rights which could not be judicially enforced without occasioning a greater general mischief or inconvenience than that which results from leaving them to be disposed of *in foro conscientiae*. **18.**

It will be seen from the next section that both the Equity and Common Law Jurisdiction have been the subject of very great alteration by the Judicature Acts. **19.**

## SECTION II.

*Of the General Effect of the Judicature Acts, as regards Equity Jurisdiction and Jurisprudence.*

The Judicature Acts, 1873 and 1875, almost entirely relate to Pleading and Practice, and not to Jurisprudence, which is the exclusive subject of this Manual and of the Author's Manual of Common Law. They do not make any general fusion of Law and Equity. But the first Act (see Appendix) consolidates the different Superior Courts by which Law and Equity are administered into one Court, which is divided into several "Divisions." And section 24 (Appendix) enables every Judge of that Court to deal concurrently with matters of Law and Equity arising between the same parties, except so far as by section 34 certain business is assigned to particular Divisions of the Court. Sub-section (7) of section 24 enables the High Court of Justice and the Court of Appeal to "grant, either absolutely or

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on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." And section 89 gives similar powers to the Judges of Inferior Courts, to the extent of their jurisdiction. Section 25 (Appendix) makes a few changes in certain specific points of Jurisprudence, which are noticed in the proper places in this Manual. And section 25 also comprises the important enactment (clause 11, Appendix), "that generally in all matters, not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of Common Law with reference to the same matter, the rules of Equity shall prevail." **20.**

## SECTION III.

*Of the General Maxims of Equity  
Jurisprudence.*

In addition to those maxims which are INTROD.  
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acted upon as well in Courts of Law as in Courts of Equity, and besides various other maxims which in terms apply to particular parts of the Equity system, there are certain general maxims peculiar to Equity which it is of the greatest use rightly to understand, and to bear in mind, whether in reading or in practice. **21.**

I. It is a maxim, that Equity will not suffer a right to be without a remedy. (1 I. No right  
without a  
remedy.  
Cru. Dig. X. 1, 50.) (a) It will be evident from the first section that this maxim lies at the very foundation of a large proportion of Equity Jurisprudence, as a

(a) The writer humbly submits that this maxim was ignored by the decision of the Court of Appeal in *Day v. Brownrigg*, L. R. 10 Ch. D. 294, in such a way as needlessly to violate common sense, right reason, and natural justice. There was both *damnum* and *injuria*. Under the particular circumstances, the plaintiff had the clearest right. The fact that the case was new did not prevent the right existing; for, decisions do not make the law, but only declare it. It may be confidently hoped that the decision of the Vice-Chancellor Malins will some day be affirmed by the House of Lords.

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suppletory system. But it will also appear from the observations made in that section, that this maxim must be regarded as referring exclusively to rights which come within a class of rights enforced at Law, or capable of being judicially enforced without occasioning a greater detriment or inconvenience to the public than would result from leaving them to be disposed of *in foro conscientiae*. And it must also be understood to refer to cases where the party who is remediless at Law has not sacrificed or lost his remedy by his own act or laches (see St. § 684 a & c), and where there was no equal or superior adverse right. And there are some exceptive cases of claims of natural justice capable in themselves of being enforced with propriety, but to which neither the Common Law nor Equity give any remedy : as in the case of the exemption at Common Law of the lands of deceased debtors from the payment of debts—an exemption which has been removed by certain statutes, particularly by 3 & 4 Will. IV. c. 104. (See 1 Sp. 174, 417; and Smith's Compendium of the Law of Property, 5th ed., par. 1366.)

22.

II. Equity  
will administer a due  
remedy,

II. But not only will Equity often administer a remedy where the Law would not

give any relief, but it will also afford relief, as we have already seen, where the Courts of Law originally did not clearly give adequate and complete relief, at least without circuitry of action or multiplicity of suits, or could not take due care of the rights of all who were interested in the property in litigation. **23.**

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where it  
could not be  
had at Law.

III. But, as we have also seen, where it is clear that the Courts of Law did always afford adequate and complete relief without the aid of a Court of Equity, and without circuitry of action and multiplicity of suits, and could take due care of the rights of all persons interested in the property in litigation, there Equity had no jurisdiction. **24.**

III. But  
Equity will  
not interfere  
where the  
Courts of  
Law could  
administer  
a due  
remedy.

Thus, where there was always an adequate and complete remedy at Law for the recovery of rent, either by an action or distress, no suit will be entertained in Equity, although the remedy in Equity may be more beneficial. The cases in which a suit is commonly entertained in Equity for this purpose are such as stand upon some peculiar equity; as where the premises out of which the rent is payable are uncertain; or where the time or amount of the payment is uncertain; or where a discovery or an apportionment was wanted; or where the remedy at Law is

Illustration  
drawn from  
the case of  
rents.

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obstructed or evaded by fraud, or is gone without laches ; or where none ever existed ; or where it was inadequate, incomplete, or doubtful. (See St. § 684-7.) **25.**

**IV. Equity  
follows the  
Law.**

IV. Although Equity would go beyond the Law in supplying a remedy in the cases above mentioned, yet it is a well-known maxim that Equity follows the Law. (See St. § 64 a, b ; 1 Sp. 419, 420.) (a) The reason is, that there may be uniformity of decision. (2 Sp. 359, n. (a).) **26.**

The true meaning of this maxim would seem to be, that Equity is governed by legislative enactments and the rules of Law, in regard to legal estates, rights, and interests ; and that it is regulated by the analogy of such legal estates, rights, and interests, and the legislative enactments and rules of Law affecting the same, in regard to equitable estates, rights, and interests, where any such analogy plainly subsists ; if, in each case, there are no peculiar circumstances rendering it absolutely necessary to deviate from this rule, or creating an equitable obligation in one of the litigant parties, and an equitable correlative right in favour of another litigant party, and requiring a different course to be

(a) But see *supra*, page 12, as to the Supreme Court of Judicature Act, 1873, s. 25, clause 11.

taken in the particular case, without overturning or destroying the general application of any legislative enactments or rules of Law that may, in terms or by analogy, apply to the case. **27.**

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There may indeed be cases in which Equity has followed the Law, even where there have been such peculiar equitable circumstances. But it is conceived that these must be cases in which the Court has (perhaps improperly) declined to exercise the authority which it really possessed and has ordinarily exerted. **28.**

To affirm that Equity follows the Law in any less limited sense than that above pointed out would be to negative the existence of a large portion of Equity Jurisprudence, if not to assert that there is no such thing as Equity as distinct from Law. But to affirm that Equity follows the Law, in the restricted sense above pointed out, is merely to assert what is unquestionably true, and most important to be remembered; namely, that Equity will suffer legislative enactments and the rules of Law to govern, and the course of Law to proceed, as far as it can without sacrificing claims grounded on peculiar circumstances which render it incumbent upon a Court of Equity to interpose, in accordance

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with the maxim previously mentioned, that Equity will not suffer a right to be without a remedy. **29.**

Illustration  
of the  
maxim in  
regard to  
trusts  
executed.

In illustration of the maxim, as it applies to equitable estates, rights, and interests, it may be observed that the limitations by which equitable estates and interests are created by way of trust executed, that is, a trust formally and finally declared by the instrument creating it, are construed in the same manner as similar limitations of legal estates and interests would be construed in a Court of Law; so that, for example, what would create an estate tail in the one case will create an estate of the same kind in the other case.

Maxim does  
not apply to  
trusts exe-  
cutory in all  
respects.

But such a constructive assimilation does not always take place in regard to equitable estates and interests created by way of trust executory, which, as opposed to a trust executed, is a trust not formally and finally declared by the instrument creating it, but intended to be so declared by some future instrument. For, in the case of trusts executory, there is often no substantial analogy, forming a ground for such assimilation; because in many cases the words are not so much actual limitations, such as those by which legal estates and interests are created, as instructions or intimations as to

the mode in which the author of the trust wishes the property to be settled by some future conveyance, settlement, or assurance referred to in the instrument creating the trust; and therefore the words are to be construed according to the intent of the party, as presumable from the nature of the case, or from the other parts of the instrument, rather than according to what would be the strict operation of the words, supposing them to be actual limitations contained in a formal and final instrument. (As to these trusts, see Smith's *Executory Interests*, annexed to *Fearne's Treatise*, § 489-502, and § 601-637; *Lord Glenorchy v. Bosville*, 1 Lead. Cas. Eq. 2nd ed. 1 *et seq.*) **30.**

In illustration of the qualification that Equity follows the Law only where there are no such peculiar circumstances as above mentioned, it may be observed, that Equity follows the law in regard to the rule of primogeniture, although that rule in any particular instance in which it is so followed may be productive of the greatest hardship towards all the younger members of a large family who, in one sense, by the operation of the rule, may be left without any sort of provision, whilst the eldest son may be placed in a state of the greatest affluence. But these

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Illustrations of the qualification added in the writer's statement of the true meaning of the maxim.

Law of primogeniture.



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are not peculiar circumstances creating an equitable right to relief in favour of the youngest children against the eldest son, and demanding the interposition of a Court of Equity. The mere absence or want of a provision, which may have arisen from the culpable neglect of the parent, can create no equity against the eldest son. He has the right to the descended or entailed estate, without any reference to the circumstances of the other members of the family; and the mere fact that they have not been provided for by their parent can impose on the eldest son no obligation, in a Court of Equity, to divest himself, and can give the younger children no equitable right to strip him, of that provision which the Law has appointed him. No relief could be given in such a case as this, without directly derogating from a rule of Law, which a Court of Equity has no power to do. But if an eldest son should prevent his father from executing a will devising one of his estates to a younger brother, by promising to convey the estate to such younger brother, although that estate would at Law descend to the eldest son, a Court of Equity would doubtless interpose, and prevent the eldest son from asserting any claim to it. (St. § 64.) So Equity will often

support the defective execution of powers, where at Law the act would be wholly nugatory. (St. § 64 a; *Tollet v. Tollet*, 1 Lead. Cas. Eq. 2nd ed. 184 *et seq.*) And in cases under the old Statute of Limitations (21 Jac. I. c. 16), Equity often interfered, notwithstanding the time fixed by the statute had expired, where it would have been inequitable to have allowed the statute to be a bar; as when a person perpetrated a fraud, which was not discovered till the statutory bar applied at Law; or where a person carried on an unfounded litigation, protracted so as to subject his adversary to the statutory bar at Law. (St. § 1521; 2 Sp. 62.) But, although, in these cases, Equity did not follow the Law, yet it did not overturn or destroy the general application of the enactment. It only refused to apply it in particular instances, where there were peculiar circumstances creating an equitable right to relief, demanding the interposition of the Court in its support, and capable of being enforced without at all derogating from the general application of the enactment in question. So far from derogating from the Statute, Equity was regulated by analogy to the Statute, as to the precise time fixed for asserting equitable titles and claims to which the Statute did

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Powers.

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Limitations.

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not apply. (See St. § 64 a, 1520 ; 2 Sp. 60, 61. And for other illustrations of the qualifications of the rule above stated, see St. § 476, 480, and Title II., Chap. III., on Express Trusts, *infra*.) **31.**

**Attachment  
of debts.**

Where an Act of Parliament has created a particular remedy at Law, the Court is not bound to create an analogous remedy in Equity, even where the remedy at Law is unavailable. And hence a judgment creditor cannot obtain a charge in Equity on an equitable debt, by analogy to an attachment of a legal debt under the Garnishee clauses of the Common Law Procedure Act, 1854. (*Horsley v. Cox*, L. R. 4 Ch. Ap. 92.) **32.**

**V. *Vigilantibus, non dormientibus, æquitas subvenit.***

V. It is a maxim that *vigilantibus, non dormientibus, æquitas subvenit*: the meaning of which is, that Equity discountenances laches, and, independently of any Statutes of Limitation, has always refused to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. (St. § 959 a, 1284 a, 1520 ; *Baker v. Read*, 18 Beav. 368 ; *Wright v. Vanderplank*, 2 K. & J. 1 ; *Alloway v. Braine*, 26 Beav. 575 ; *Robertson v. Norris*, 1 Gif. 421 ; *Gresley v. Mousley*, 1 Gif. 450 ; 4 D. & J.

78; *Bright v. Larcher* (No. 2), 4 D. & J. 608; *Harcourt v. White*, 28 Beav. 303; *Bright v. Legerton*, 2 D. F. & J. 606; *Blagrove v. Routh*, 8 D. M. & G. 620; *Laver v. Fielder*, 32 Beav. 1; *Hodgson v. Bibby*, 32 Beav. 221; *Downes v. Jennings*, 32 Beav. 290; *Wentworth v. Lloyd*, 32 Beav. 467; *Strange v. Fooks*, 4 Gif. 408; *McDonnell v. White*, 11 H. L. Cas. 570; *Barwell v. Barwell*, 34 Beav. 371; *Seagram v. Knight*, L. R. 3 Eq. 398.) And the mere assertion of a claim, unaccompanied by any act to give effect to it (as by taking legal proceedings to enforce it) will not avail to keep it alive. (*Clegg v. Edmondson*, 8 D. M. & G. 787.) In the case of laches, it would in many cases be impossible to interfere, without doing injustice to third persons who had acquired interests in the property during the intervening period. Thus, the right of a creditor to make legatees refund may be lost by laches. (*Ridgway v. Newstead*, 2 Gif. 492; *Lehmann v. McArthur*, L. R. 3 Ch. Ap. 496.) In general nothing can call forth a Court of Equity into activity, but conscience, good faith, and reasonable diligence. (2 Sp. 60, 61.) "It has been beautifully remarked, with respect to the emblem of

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Time, who is depicted as carrying a scythe and an hour-glass, that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed." (*Bright v. Legerton*, 2 D. F. & J. 617.) **33.**

In *De Bussche v. Alt*, L. R. 8 Ch. D. 286, the judgment of the Court of Appeal was delivered by Thesiger, L.J.; and at p. 314 are these words:—"If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. . . But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the

enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding." **33a.**

VI. Where there is equal Equity, the Law must prevail; in other words, if the defendant has a claim to the protection of a Court of Equity, equal to the claim which the plaintiff has to the assistance of the Court, there the Court will not interpose, but will leave the matter as it stands. It is upon this account that a Court of Equity refuses to interfere against a *bond fide* purchaser for a valuable consideration without notice of the adverse title, if he is in possession or has purchased from an apparent owner in possession, and if he chooses to avail himself of the defence at the proper time and in the proper mode. (St. § 64 c, 436; 2 Sp. 733; *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 2nd ed. 1 *et seq.*; *Attorney-General v. Wilkins*, 17 Beav. 285; *Green-*

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VI. Where  
there is  
equal  
equity, the  
Law must  
prevail.

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*slade v. Dare*, 20 Beav. 284; *Lane v. Jackson*, 20 Beav. 535; *Colyer v. Finch*, 5 H. L. Cas. 905, 920; *Ogilvie v. Jeaffreson*, 2 Gif. 353, 379; *Clemow v. Geach*, L. R. 6 Ch. Ap. 147; *Pilcher v. Rawlins*, L. R. 11 Eq. 53; reversed L. R. 7 Ch. Ap. 259. See also *Carter v. Carter*, 3 K. & J. 617; *Heath v. Crealock*, L. R. 10 Ch. Ap. 33.) **34.**

VII. Equality is Equity.

Illustration drawn from the case of a joint purchase or mortgage.

VII. Another maxim is, that Equality is Equity, or, that Equity delighteth in Equality. (St. § 64 f.) Acting on this principle, Equity leans strongly against joint-tenancy, as it is attended with the inseparable incident of the right of survivorship. For, although it is true that each joint tenant may have an equal chance of being the survivor, yet this is but an equality in point of chance; as soon as one dies, there is an end to the equality between them: on that event the whole accrues to the survivor. And the equal certainty of having an absolute equal share, or a share proportionate to the amount of the purchase-money advanced, which is an equal share so far as the justice of the case will permit, is considered in Equity far better than an equal chance of having the whole or none of the property purchased. The former is considered to be the true and just equality. And therefore,

if two persons jointly purchase, or take a mortgage of an estate, and advance the purchase or mortgage money in unequal proportions, Equity, on the death of either of them, acting on the maxim that Equality is Equity, will hold the survivor a trustee for the representatives of the deceased, as to a share proportionate to the amount of the money so advanced by him. (See St. § 1206; *Lake v. Gibson*, 1 Lead. Cas. Eq. 2nd ed. 143 *et seq.*) And this furnishes another illustration of the violation of the terms of the maxim, that Equity follows the Law, though not of the qualified and true sense of that maxim as above explained. **35.**

VIII. Another maxim is, that he who comes into a Court of Equity must come with clean hands. So that if a person seeks to cancel, set aside, or obtain the delivery up of an instrument on account of fraud, and he himself has been guilty of wilful participation in the fraud, Equity will not interpose in his behalf, unless the fraud is against public policy, and public policy would be defeated by allowing it to stand. (See St. § 695.) **36.**

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SEC. III.

VIII. He who comes into Equity must come with clean hands.

Illustration drawn from a fraudulent transaction.

The rule must be understood to refer to wilful misconduct in regard to the matter

Qualification of the maxim.



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SEC. III.

in litigation, as in the foregoing example, and not to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern. **37.**

IX. He who seeks equity must do equity.

IX. It is also a maxim, that he who seeks equity must do equity. (St. § 64 c, 707; 1 Sp. 422.) **38.**

The meaning of this is, that he who seeks equity must do equity in the transaction in respect of which relief is sought; for the rule does not reach so far as to affect any other transaction than that in respect of which the relief is sought. (*Wilkinson v. Fowkes*, 9 Hare, 592; *Gibson v. Goldsmid*, 5 D. M. & G. 757.) **39.**

Illustration drawn from a usurious transaction.

To give an illustration of this maxim, a Court of Equity will not set aside a usurious transaction on a bill filed by the borrower, unless upon the terms that he will pay the lender what is *bond fide* due to him (a). It must not be inferred from this, however, that the Court will oblige the borrower to

(a) The Usury Laws are abolished by the stat. 17 & 18 Vict. c. 90, except those relating to pawnbrokers, and except as regards transactions prior to the 10th of August, 1854. But the repeal of the usury laws has not affected the right of the Court to give relief against unconscionable bargains. (*Miller v. Cook*, L. R. 10 Eq. 641, 646; *Tyler v. Yates*, L. R. 11 Eq. 265.)

pay what is so due, on a bill filed by the lender to enforce his claim (see St. § 64 e); for that would be contrary to the maxim, that he who comes into Equity must come with clean hands. **40.**

X. It is a maxim, that Equity looks upon that as done which ought to be done. (2 Sp. 253 *et seq.*) This maxim is acted on in some cases (as in the case of agreements) in favour of persons who have a right to ask that acts might be done, so as virtually to place them, as near as may be, in the same advantageous position as if those acts had been done in the way in which, and at the time when, they ought to have been performed. (See St. § 64 g; 2 Sp. 264; and see Title II. Chap. VIII., *infra*.) **41.**

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X. Equity looks on that as done which ought to be done.

As a consequence of this maxim, money directed to be employed in the purchase of land, and land directed to be turned into money, are in general regarded as that species of property into which they are directed to be converted (2 Sp. 256-8; and *infra*, Title II. Chap. VIII. § 4), that is, either immediately, or at some future time, according to circumstances. (2 Sp. 258.) And where the intention in marriage articles is plain, that a conversion should be made, but consents of the parties interested to the

Conversion.

INTROD.  
SEC. III.

actual purchase cannot be obtained as required by the instrument, by reason of their deaths or for some other cause, if any convenient purchase could have been obtained, the Court will take upon itself to judge whether such consents ought to have been given, and the conversion being the paramount object, it will be considered as made. If this were otherwise, the parties to consent would have the option of determining whether the property should be real or personal, which, unless it be clearly given to them, will not be permitted. An equitable conversion of land into money, or of money into land, takes place by force of the direction, notwithstanding the conversion or investment is directed to be made with the approbation of certain parties; and legatees of legacies out of a property directed to be converted with the consent of the tenant for life in writing are entitled to their legacies, whether the property be converted or not; and the residuary legatees of the proceeds are entitled, subject to the legacies, to the estate itself, if not converted. (2 Sp. 260, 261.) **42.**

Money devised or contracted to be laid out in land will pass under a devise of all the testator's messuages, lands, tenements, and hereditaments. (2 Sp. 264.) **43.**

Real estate may be so constructively converted as to be liable to legacy duty. (2 Sp. 267.) **44.** INTROD.  
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The persons to whom property directed to be converted is limited, and those who stand in their place are entitled to enforce the conversion, either actually or virtually. (See 2 Sp. 268, 269.) But a stranger (such as the Crown or the lord claiming in default of heirs) is not entitled to call for a conversion. (2 Sp. 266.) **45.**

Where money to be converted gets into the hands of the person who is absolutely entitled to it either way, the operation of the rule of conversion will cease. (2 Sp. 270.) **46.**

Where the property is outstanding in a trustee, but there is some person who is absolutely entitled to the property, whether taken as realty or personalty, such person, by any act from which his intention may be collected, may declare his election in what quality it shall be taken. (2 Sp. 271; *Fletcher v. Ashburner*, 1 Lead. Cas. Eq. 2nd ed. 659 *et seq.*) Until an election is made, the property passes as if actually converted, and the onus lies on those who would show an election to take it in another character than that it would have if converted. (2 Sp. 272.) **47.**

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SEC. III.

Person  
having a  
right to call  
for an  
assignment  
or convey-  
ance treated  
as if he had  
obtained it.

Where one person has a better equity than another person in respect of the same property, in which each has an interest, the former has a right to call for an assignment or conveyance of the legal estate, and in Equity he will be placed in the same situation as if he had actually obtained a conveyance or assignment. (2 Sp. 728.) **48.**

Equity of  
volunteers.

Volunteers have equal equities among themselves; but a volunteer, though a wife or child, has not equal equity with a *bonâ fide* purchaser for a valuable consideration, even with notice of the claim of the volunteer. (2 Sp. 728.) **49.**

XI. *Qui  
prior est  
tempore,  
potior est  
jure.*

XI. As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity: *qui prior est tempore, potior est jure*. But in a contest between persons having only equitable interests, priority of time is the last preference resorted to; *i.e.*, a Court of Equity will not prefer the one to the other on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all other respects equal: and if the one has, on other grounds,

a better equity than the other, priority of time is immaterial. (Kindersley, V.-C., in *Rice v. Rice*, 2 Drew. 78; *Stackhouse v. Countess of Jersey*, 1 Johns. & H. 721; *Cory v. Eyre*, 1 D. J. & S. 149; *Shropshire Union Railways, &c., Co. v. The Queen*, L. R. 7 H. L. 496.) **50.**

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XII. Where a man is bound to do an act, and he does one which is capable of being considered to have been done in fulfilment of his obligation, it shall be so construed; because it is right to put the most favourable construction on the acts of others. (2 Sp. 204; *Wilcocks v. Wilcocks*, 2 Lead. Cas. Eq. 2nd ed. 345 *et seq.*; *Blandy v. Widmore*, 2 Lead. Cas. Eq. 2nd ed. 347.) **51.**

XII. Equity  
imputes  
intention to  
fulfil an  
obligation.

In the case of a covenant, that, on the death of the covenantor, a wife or relative shall receive a gross sum, his or her distributive share, in the case of an intestacy, if equal to or greater than the sum covenanted to be paid, is to be considered as a performance; if less, as a part performance. But where the covenant is, that an annuity shall be paid or secured on the death of the covenantor, the distributive share is not a performance or part performance. (*Id.*; 2 Sp. 608, 609.) And where the covenant debt arises in the

Where a  
distributive  
share is a  
satisfaction  
of an obliga-  
tion by  
covenant.

INTROD.  
SEC. III.

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lifetime of the covenantor (as where he covenants within two years after marriage to pay a certain sum, and he outlives the two years), a distributive share will not be a performance or a satisfaction of the covenant. (2 Sp. 609.) **52.**

XIII. Loss  
must be  
borne by  
person occa-  
sioning it.

XIII. It is a rule both at Law and in Equity, that whenever one of two innocent persons must suffer, he who, contrary to legal or moral obligation, has occasioned the loss, or enabled another to occasion the loss, must bear it. But the mere omission by a person to do something which it is not his duty to do, but which, if done, would have prevented the loss, is not sufficient to render him liable for such loss. (See judgment of Lindley, J., in *Keith v. Burrows*, L. R. 1 C. P. D. 734.) **53.**

XIV. Rules  
as to foreign  
or colonial  
property or  
contracts.

XIV. It may be observed in this place, that it is a rule, that although the property in controversy be situate in a country out of the jurisdiction of the Court, whether within the English dominions or not, yet the Court, in all cases where the proper parties are within the territorial process of the Court, will afford relief, so far as it can be afforded, by proceeding against the persons, and not directly against the property. (See St. § 1290-1300, 1352 a; 2 Sp. 7; *Penn v.*

*Lord Baltimore*, 2 Lead. Cas. Eq. 2nd ed. 767 INTROD.  
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*et seq.*) Thus, a suit cannot be brought for a partition of land situate in a country out of the jurisdiction ; for the Court cannot award a commission there. (St. § 1292 ; 2 Sp. 8, n. (d).) But a suit may be maintained for an account of the rents and profits of land out of the jurisdiction, or for a specific performance of an agreement respecting such land. (St. § 1291, 1300, 743, 744.) And a foreclosure decree being a decree *in personam*, depriving the mortgagor of his personal right to redeem, the Court has jurisdiction to make such a decree between an English mortgagor and mortgagee of land in one of the colonies. (*Paget v. Ede*, L. R. 18 Eq. 118.) And the Court has gone so far as indirectly to overhaul the judgments of foreign Courts, and even the sales made under these judgments, where fraud has intervened in those judgments, or a grossly inequitable advantage has been taken. (St. § 1294 ; 2 Sp. 9.) But a plea of fraud was a good defence at Law to an action on a foreign judgment, and, therefore, the Court of Chancery would not interfere with the action at Law, on the ground that such judgment was obtained by fraud. (*Ochsenbein v. Papelier*, L. R. 8 Ch. Ap. 695.) **54.**



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SEC. III.

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If a matter is within the jurisdiction of a tribunal of competent jurisdiction in another country, a Court of Equity, except under special circumstances, will leave the matter to be disposed of by that tribunal. (2 Sp. 10.) **55.**

The right to personal property follows the domicile, but the right to land or immovable property is to be determined by the law of the country where it is situate. Yet, if that question is mixed up with others—for instance, with matters of account, which can be more conveniently disposed of here—the Court will entertain jurisdiction of the whole matter; giving directions, in case of need, for instituting any proceedings in the Colonial Courts. (2 Sp. 12; see *Baillie v. Baillie*, L. R. 5 Eq. 175.) **56.**

The remedy upon contracts must be that which is given by the law of the country where the parties reside. (2 Sp. 14.) But contracts are generally construed according to the law of the place in which they were made. And, as a general rule, a contract will not be enforced, unless it is valid both by the law of the country in which it was made, and by the law of the country in which it is sought to be enforced. (2 Sp.

13, 14; *Hope v. Hope*, 8 D. M. & G. 731.) INTROD. SEC. III.  
**57.**

Where a written contract is made in a foreign country and in a foreign language, an English Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and, fourthly, evidence of any peculiar rules of construction, if any such rules exist, by the foreign law. And, with this assistance, the Court must then interpret the contract itself on ordinary principles of construction. (*Di Sora v. Phillipps*, 10 H. L. Cas. 624, 633.) **58.**

XV. "If a person has sustained injury in consequence of any order or proceeding of a Court of Equity, or by reason of anything which has occurred in the execution of its process, he must seek redress there, and not in a Court of Law. If the matter complained of involves a question of the jurisdiction of Equity, or of the validity or effect of its order or process, it will never allow such a question to be carried for decision to a Court of Law; but if, admitting the jurisdiction of the Court and the validity of its order, redress is sought merely

XV. Interference of Courts of Law with the decisions of Courts of Equity.

If a matter is  
tribunal of com-  
country, a Cou-  
special circum-  
can be disposed

35.

The right  
the domicile, I  
movable prop-  
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## SECTION IV.

*Of the Division of Equity.*

The subject of Equity Jurisprudence may be conveniently, and perhaps most properly, treated under the following heads, designated according to the more distinctive characteristics of the relief afforded, or the general objects sought to be effected. INTROD.  
SEC. IV.

- I. Of Remedial Equity, specifically so termed.
- II. Of Executive Equity.
- III. Of Adjustive Equity.
- IV. Of Protective Equity, irrespective of disability.
- V. Of Protective Equity, in favour of persons under disability. **60.**

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in respect of some irregularity or excess in the execution of its order, it will, at its discretion, either itself give redress to the aggrieved party, or permit him to proceed at Law, as justice and convenience may require." (*Walker v. Micklethwait*, 1 Dr. & Sm. 49.) **59.**

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SEC. IV.

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- I. Of Remedial Equity, specifically so termed.
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- IV. Of Protective Equity, irrespective of disability.
- V. Of Protective Equity, in favour of persons under disability. **60.**



## **TITLE I.**

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**Of Remedial Equity,  
specifically so termed.**



## CHAPTER I.

## OF ACCIDENT.

- TIT. I.** **AN** accident, in the usual sense of the term,  
**CAP. I.** is an occurrence not referable to design. **61.**
- Definition** Accident, as remediable in Equity, may be  
**of accident.** defined to be an unforeseen and injurious  
 occurrence, not attributable to mistake, ne-  
 glect, or misconduct. **62.**
- Illustration** Thus, the reduction, by Act of Parliament,  
**in the case** of public stock directed by will to be set  
**of a reduc-** apart to answer an annuity, is an accident,  
**tion of** remediable in Equity by decreeing the de-  
**stock.** ficiency to be made up against the residuary  
 legatees. (St. § 93.) **63.**
- I. Accidents** I. There are many cases of accident in  
**remediable** which due relief could always be obtained at  
**at Law.** Law; and there Equity would not interpose.  
 (St. § 79.) **64.**
- II. Acci-** II. On the other hand, there are many  
**dents not** cases in which no remedy can be had either  
**remediable** at Law or in Equity. (St. § 79.) **65.**  
**at Law or** Thus,  
**in Equity,**
- as in cases** 1. No relief will be granted where the  
**of culpabi-** accident arose from the gross neglect or  
**lity of the**  
**sufferer ;**

fault of the party seeking relief, or his agents. (St. § 105.) **66.**

**TIT. I.**  
**CAP. I.**

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2. And where a person has expressly and absolutely contracted or covenanted to do a particular thing, it is no ground for the interference of a Court of Equity, that he has been prevented by accident from fulfilling his engagement, or from deriving the full benefit of the contract on his side. For he might have prevented any injury to himself from accident, by making proper exceptions; but since he has made no such exceptions, Equity will not conjecturally limit a liability which in terms is general and unqualified. (See St. § 101-5.) So that if a lessee covenants to keep the demised premises in repair, he will be bound to do so, notwithstanding any unavoidable accident by which they are destroyed or injured. (St. § 101.) And where there is a covenant to pay rent during the term, without any exceptions, it must be paid, notwithstanding the premises are accidentally burnt down during the term. (St. § 102.) So, if an estate is sold for a certain sum of money and an annuity for the life of the vendor, and the vendor dies before the receipt of any annuity, Equity will not grant relief. (St. § 104.) And an ante-nuptial settlement

TIT. I.  
CAP. I.

or of failure  
of the con-  
sideration ;

cannot be set aside, reformed, or varied, on the ground that it was intended that there should be a pecuniary consideration on both sides, whereas the pecuniary consideration on one side has failed. (*Campbell v. Ingilby*, 21 Beav. 567; 1 D. & J. 393.) **67.**

or of a  
countervail-  
ing equity

3. Nor will relief be granted in favour of a person whose equitable right to assistance is not equal, or not more than equal, to the equitable right of protection which is possessed by the party against whom the relief is sought. For this reason relief is not given against a *bond fide* purchaser for valuable consideration, without notice (see St. § 108); or against an heir in tail or remainder-man in tail, in favour of persons claiming under the tenant in tail. (St. § 107.) **68.**

or of want  
of equity ;

4. And so relief will not be granted in favour of a person who, although a great loser through an accident, has no equitable title to relief, or as little as the person against whom relief is sought. Thus, no relief will be afforded to the legatees or devisees under a will defectively executed (see St. § 105a, 106): for, being mere volunteers, they have as little equity as the heir or next of kin, or even less, inasmuch as *fortior et æquior est dispositio legis quam hominis* (Co. Litt. 338 a): and therefore the

as where a  
will is  
defectively  
executed.

legal right which has vested in the latter will not be taken away; as the maxim is, that "where the equity is equal, the law must prevail." **69.** TIT. I.  
CAP. I.

III. But where a Court of Law cannot, or, in similar cases, originally could not, or did not, give adequate relief, and take due care of the rights of all persons interested, and the party prejudicially affected is free from blame in respect of the accident, and has a conscientious title to relief, it will be granted by a Court of Equity, if it can be granted without derogating from any positive agreement, or violating any equal or superior equity in another person. (See St. § 28, 64 i, 79, 81, 85, 89, 101, 105, 106, 109.) **70.** III. Accidents remediable in Equity.

1. In cases of destroyed, lost, or suppressed deeds, the jurisdiction of Equity, to compel a discovery, would seem to have been universal, because this was a preliminary assistance peculiar to Equity. And where a discovery only was sought, Equity would grant it without any affidavit of loss; because a person would not file a mere bill of discovery, unless the instrument were really lost. **71.** 1. Jurisdiction for discovery in cases of destroyed, lost, or suppressed deeds, and

But, in these cases, the jurisdiction for relief, in addition to a discovery, was of limited jurisdiction for relief in such cases.

TIT. I.  
CAP. I.

Requisites  
to maintain  
the juris-  
diction for  
relief in  
such cases.

extent; for, in some of these cases, Courts of Law have all along been able to administer, and have been in the habit of doing, complete justice. (St. § 83, 84.) And where such relief was sought in a Court of Equity, an affidavit of the fact of destruction, loss, or suppression must have been annexed to the bill; because, in such cases, it was desired to change the forum, from a Court of Law which, *prima facie*, was the proper forum, to a Court of Equity; and therefore an affidavit was required, to prevent an abuse of the process of the Court. There must also have been an offer of indemnity in the bill when the nature of the case seemed to require it. (See St. § 83; Mitford's Pleadings, 5th ed. 65, 66.) And in order to maintain the suit, it was further indispensable that the destruction, loss, or suppression, if not admitted by the answer, should be established, at the hearing of the cause, by satisfactory proofs. (See St. § 88.) **72.**

Instances  
in which  
Equity has  
jurisdiction  
for relief in  
those cases.

Among other instances in which Equity exercises jurisdiction for relief in the case of destroyed, lost, or suppressed deeds, relief will be given in Equity where the plaintiff avers that a deed relating to land has been either destroyed or concealed by the defendant, but he (the plaintiff) knows not

whether it has been so destroyed, or whether it has been only concealed; for, there a Court of Equity will make a decree (which a Court of Law formerly could not), that the plaintiff shall hold and enjoy the land until the defendant shall produce the deed, or admit its destruction. (St. § 84.) **73.**

TIT. I.  
CAP. I.

So if a deed concerning land is lost, and the party in possession seeks a discovery, and to be established in his possession under it, Equity will afford relief. (St. § 84.) **74.**

2. A person may also come into Equity for payment of a lost bond; because until a recent period, no relief was given at Law, on account of the want of a profert. (St. § 81, 82.) And besides, at Law, the defendant had not the protection of the oath of the plaintiff to the fact of the loss. Again, it is often proper to grant relief upon the terms of the party giving a bond of indemnity; and formerly a Court of Law could not insist on that as a part of the judgment; and, although it has sometimes required the previous offer of an indemnity, yet such an offer may be unsatisfactory in many cases; for, in the meantime, the circumstances of the party to the bond of indemnity may undergo a great change. (St. § 82.) **75.**

2. Jurisdiction in cases of lost bonds.

TIT. I.  
CAP. I.

3. Jurisdiction in cases of lost unsealed securities.

3. Courts of Law could always enforce payment of money due on a lost negotiable note or other negotiable unsealed security ; because no profit was necessary, and no over was allowed of such securities. Courts of Equity, therefore, would not formerly relieve in such a case, unless there was an offer of indemnity in the bill, constituting a ground of jurisdiction. (St. § 85, 86.) And Courts of Equity had no jurisdiction to give relief on account of the destruction of a bill of exchange, because there was always a complete remedy at Law in such cases. (*Wright v. Lord Maidstone*, 1 K. & J. 701.)

76.

4. Relief in cases of the defective execution or non-execution of powers.

4. In the absence of any countervailing Equity, relief will be granted by a Court of Equity, in the case of a defective execution of a mere power (a), where it is created by an ordinary assurance, and where the defect is not of the very essence of the power, and the defective execution is in favour of a charity, or a purchaser, or a creditor, or an intended husband or a wife, or a legitimate child. And the mere manifestation of an intention to execute the power, provided it

(a) See the stat. 22 & 23 Vict. c. 35, s. 12, as to the mode of execution of powers.

clearly appears in writing, will be deemed a defective execution of the power. **77.**

TIT. I.  
CAP. I.

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But Equity will not interpose in the case of a non-execution of a mere power; for that would be depriving the donee of the right of discretion in regard to the exercise of the power. Nor will Equity support a defective execution of a power, in favour of the donee of the power, or of a husband (except in the case of an intended husband), father, or mother, or of a grandchild or more remote relation, or of a mere volunteer, except where a strict compliance with the power has been impossible, from circumstances beyond the control of the donee; as where the prescribed witnesses could not be found; or where an interested person, having possession of the deed creating the power, has kept it from the party executing the power, so that he could not ascertain the formalities required. Nor can Equity dispense with the regulations prescribed where the power is created by Statute, at least where they constitute the apparent policy and object of the Statute, or with the consent of persons whose consent is required. Nor will an execution by an absolute deed, instead of by will, be supported; as that would be repugnant to the

D



TIT. I.  
CAP. I.

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power; since it would not be revocable like a will. **78.**

But where the power is coupled with a trust, Equity will grant relief, even in case of the non-execution of the power: because, in this case, the donee was under an equitable obligation to exercise it. (See, as to these propositions respecting powers, St. § 94-8, 169-177; 2 Sugd. Pow. 7th ed. 88-175; *Tollet v. Tollet*, 1 Lead. Cas. Eq. 2nd ed. 114 *et seq.*; *Harding v. Glyn*, 2 Lead. Cas. Eq. 2nd ed. 789, 811; and Smith's Compendium of the Law of Property, 5th ed. par. 2126-2131; *Garth v. Townsend*, L. R. 7 Eq. 220; *Kennard v. Kennard*, L. R. 8 Ch. Ap. 227.) **79.**

## CHAPTER II.

## OF MISTAKE (a).

A MISTAKE, as remediable in Equity, may be defined to be an act which would not have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition. **80.**

TIT. I.  
CAP. II.

Definition  
of mistake.

The following propositions appear to be deducible from the cases on the subject:—

I. Where the mistake is unilateral, and the sufferer is the person by whom it was made, relief will not be granted, unless there is some circumstance which gives rise to a presumption that there has been some undue influence, misrepresentation, imposition, mental imbecility, surprise, or confidence abused (see St. § 117–120, 133–5, 137, 138; *Broughton v. Hutt*, 3 D. & J. 501; *Bentley v. Mackay*, 31 Beav. 143); and even where this is the case, Equity will not interfere as against a *bona fide* purchaser for

I. Mistake  
made by the  
sufferer  
alone.

(a) See the stat. 22 & 23 Vict. c. 35, s. 13, as to mistaken payments in case of sales under powers.

TIT. I.  
CAP. II.

Mistake in a  
matter of  
law,

valuable consideration, without notice. (St. § 139, and see Maxim VI. par. 34, *ante*.) **81.**

In regard to mistakes in matters of Law, it is a maxim that *ignorantia legis non excusat*. (St. § 111, 113, 116, 138, 140; *Powell v. Smith*, L. R. 14 Eq. 85.) But where the mistake is one of title, arising from ignorance of a principle of Law of such constant occurrence as to be understood by the community at large, this is considered sufficient to afford such a presumption as above mentioned, so as to entitle the party to relief. (See St. § 121-5, 128, 137.) **82.**

The Court has power to relieve against mistakes in Law as well as against mistakes in fact, if there is any equitable ground for such relief. But when money has been paid over with a full knowledge of all the facts, and the payment has been acquiesced in with such knowledge, and after taking counsel's opinion, it cannot afterwards be recovered back. (*Rogers v. Ingham*, L. R. 3 Ch. D. 351.) **83.**

or in a  
matter of  
fact.

And in regard to mistakes in matters of fact, relief will be granted on the same presumption, where the mistake is unilateral, and the fact was material to the act or contract, and was not doubtful from its own nature, and was a fact which would not be

ascertained by such diligence or care as is usual in transactions of the like nature, and of which the other party was under a legal obligation to inform the mistaken person. (See St. § 117, 118, 140, 141, 146-8, 150, 151.) **84.** TIT. I.  
CAP. II.

And ignorance of foreign Law is deemed ignorance of fact; because no person is presumed to know foreign Law. (St. § 140.) **85.** Ignorance of  
foreign Law.

But ignorance, on the part of the vendor, of circumstances tending to enhance the value of the property, of which the vendee was aware, will not form a ground for relief, where it is not a case of mutual confidence. (St. § 149.) **86.** Vendor's  
mistake as  
to value.

II. Where the mistake is mutual, the transaction will be binding; unless it was founded in a mutual surprise; or the mistake consists in supposing that the subject-matter of the contract existed, when in reality it was not in existence; or the mistake consists in one party supposing that he had purchased something which the other did not intend to sell (St. § 113, 134, 142, 143 a, 144); or the mistake is the result of a miscalculation by the defendant's agent in favour of the defendant (*Carpmael v. Powis*, 10 Beav. 36); or by reason of the fact being II. Mutual  
mistake.

TIT. I.  
CAP. II.

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otherwise than was supposed, there is no consideration to support the transaction (*Cochrane v. Willis*, 34 Beav. 359; L. R. 1 Ch. Ap. 58); or both parties were under the impression that one of them was the owner of property which, in reality, belonged to the other (*Cooper v. Phibbs*, L. R. 2 H. L. 149); or one of the parties made a material misrepresentation, though innocently, which influenced the other (*Fane v. Fane*, L. R. 20 Eq. 698). Where, however, by a mutual mistake arising from misinformation by the lessor's solicitor's clerk, an underlease was granted for several more years than the lessee had power to grant, the Court, after many years, refused compensation to the underlessee. (*Besley v. Besley*, L. R. 9 Ch. D. 103.) **87.**

III. Com-  
promises.

III. In the case of a compromise of doubtful rights, or of rights which are considered by the parties to be doubtful, to make it binding, the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection, where, from their relative position or other circumstances, they need it. (*Moxon v. Payne*, L. R. 8 Ch. Ap. 881, 885.) If all the parties are in a state of mutual ignorance, or they are all acquainted with

the doubts which exist in their favour, the compromise will be binding. But where one or more of them is or are not aware of the doubts existing in his or their favour, while the fact that such doubts exist is known to the other or others of them, the compromise will not be binding (see St. § 130-2; *Lucy's Case*, 4 D. M. & G. 356; *Stapilton v. Stapilton*, 2 Lead. Cas. Eq. 2nd ed. 684 *et seq.*); because, in that case, there is room for the presumption of surprise or confidence abused; and the very nature of the transaction made it requisite, that all the parties should be on an equality as regards knowledge or ignorance of the doubts existing in their favour. To render a family compromise binding, there must be an honest disclosure, by each party to the other, of all such material facts known to them, relative to their rights and title, as are calculated to influence the judgment in the adoption of the compromise; and any advantage taken by either of the parties of the known ignorance of the other as to such facts renders such compromise void in Equity. (*Smith v. Pincombe*, 3 Mac. & G. 659; *Greenwood v. Greenwood*, 2 D. J. & S. 28; *Brooke v. Lord Mostyn*, 2 D. J. & S. 373.) **88.**

TIT. I.  
CAP. II.

TIT. I.  
CAP. II.

IV. Correction of a mistake in a written instrument, or in regard thereto.

IV. Where by mistake an instrument *inter vivos* is not what the parties intended, or there is a mistake in it other than a mistake in Law, or any acts necessary to give validity to the instrument have been omitted, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted on the record, or is evident from the nature of the case, or from the rest of the deed, Equity will rectify the mistake (St. § 152, 157, 159, 166, 168; and see Sugd. V. & P. 10th ed. ch. 3, sect. 11, pl. 2; *Lord Glenorchy v. Bosville* and *Legg v. Goldwire*, 1 Lead. Cas. Eq. 2nd ed. 1 *et seq.*; *Meadows v. Meadows*, 16 Beav. 401; *Murray v. Parker*, 19 Beav. 305; *Torre v. Torre*, 1 Sm. & Gif. 518; *In re Morse's Settlement*, 21 Beav. 174; *Wright v. Goff*, 22 Beav. 207; *Wolterbeck v. Barrow*, 23 Beav. 423; *Wilson v. Wilson*, 5 H. L. Cas. 40, 52-7, 59, 63, 71; *Mostyn v. Mostyn*, 5 H. L. Cas. 155; *Fowler v. Fowler*, 4 D. & J. 250; *Earl of Bradford v. Earl of Romney*, 30 Beav. 431; *Garrard v. Frankel*, 30 Beav. 445; *Walker v. Armstrong*, 8 D. M. & G. 531; *Daniel v. Arkwright*, 2 Hem. & Mil. 95; *Earl of Malmesbury v. Countess of Malmesbury*, 31 Beav. 407; *Scholefield v. Lockwood* (No. 2), 32 Beav. 436; *Harris v*

*Pepperell*, L. R. 5 Eq. 1; *Druiff v. Lord* TIT. I.  
CAP. II.  
*Parker*, L. R. 5 Eq. 131; *Brooke v. Haymes*,  
 L. R. 6 Eq. 25; *In re De La Touche's Settle-*  
*ment*, L. R. 10 Eq. 599; *Smith v. Iliffe*,  
 L. R. 20 Eq. 666; *Cogan v. Duffield*, L. R.  
 20 Eq. 789; *In re Boulter, Ex parte*  
*National Provincial Bank*, L. R. 4 Ch. D.  
 241); except as against a *bond fide* pur-  
 chaser for valuable consideration, without  
 notice (St. § 165; 2 Sp. 195), or other person  
 having an equity equal to that of the  
 plaintiff (St. § 176), such as the issue in  
 tail, or a remainder-man in tail, where  
 there is no equity to affect the conscience  
 of such issue or remainder-man (St.  
 § 178). **89.**

But in order to enable the Court to rectify an ante-nuptial settlement by striking out a part, it must be proved that it contains something which has been inserted by mistake, contrary to the intention of all the parties. (*Rooke v. Lord Kensington*, 2 K. & J. 753, 764; *Sells v. Sells*, 1 Dr. & Sm. 42; *Thompson v. Whitmore*, 1 Johns. & H. 268; *Elwes v. Elwes*, 2 Gif. 545; 3 D. F. & J. 667.) And where an instrument is substantially what the parties intended, although so framed under a mistaken view of the Law, the Court will



TIT. I. not rectify the mistake. (St. § 113–115.)  
CAP. II.

A bond to leave or convey property has, however, been sometimes upheld in Equity, as an agreement defectively executed. (St. § 136.) **90.**

A husband cannot take proceedings to have a settlement rectified, where he executed it with a knowledge of its contents, though he gave notice before the marriage that he should apply to the Court to have it rectified. (*Eaton v. Bennett*, 34 Beav. 196.) **91.**

A Court of Equity will not remedy a defect or supply an omission in a deed in favour of a stranger, where there is no consideration, even in the plainest case, and even when it has arisen from mere mistake, and though the correction would not be inconsistent with the deed. (2 Sp. 886.) **92.**

A voluntary deed cannot be reformed, except with the consent of the donor. (*Phillipson v. Kerry*, 32 Beav. 628; *Broun v. Kennedy*, 33 Beav. 133, 147. But see *Thompson v. Whitmore*, 1 Johns. & H. 268.) **93.**

It should be observed, that where the final instrument of conveyance or settlement differs from the preliminary contract, that very circumstance affords of itself some

ground for presuming an intentional change of purpose, unless, from some recital in it, or from some attendant circumstances, it appears to have been intended to be merely in pursuance of the original contract. (St. § 160.) **94.**

TIT. I.  
CAP. II.

When there are articles and a settlement before marriage, as a general rule the settlement alone can be looked to : if it is different from the articles, it must be taken as a new agreement. But if it purports to be executed in pursuance of the articles, or if there is clear and satisfactory evidence showing that the discrepancy has arisen from a mistake, the Court will reform the settlement, and make it conformable to the real intention of the parties. (2 Sp. 140 ; *Bold v. Hutchinson*, 5 D. M. & G. 558, 568.) If the articles are before marriage and the settlement after marriage, the articles are in effect the binding instrument ; and if the settlement gives estates or interests different from those which the Court would give on the construction of the articles, the settlement will be reformed, as between the parties and their representatives and mere volunteers, but not as against a purchaser for valuable consideration without notice. (2 Sp. 140, 141 ; *Peachy on Settl.* 132.) **95.**

TIT. I.  
CAP. II.

And as regards the admissibility of the evidence, it is a rule of the Common Law, independently of the Statute of Frauds, that parol evidence is not admissible to disannul, substantially add to, subtract from, qualify, or vary a written instrument. (See St. § 153, 158; and see also Sugd. V. & P. 10th ed. ch. 3, sect. 8, pl. 2, 26, 33, &c., and sect. 11, pl. 5.) But upon principle it would seem that cases of accident, mistake, and fraud are (in many instances at least) to be deemed, in Equity, exceptions to this rule. (St. § 155, 156, 161, notes: remarks of Sir J. Romilly, M.R., in *Murray v. Parker*, 19 Beav. 398.) **96.**

V. Where an instrument is so general in its terms as to release the rights of a party to property, to which he was wholly ignorant that he had any title, and which was not within the contemplation of the bargain, the Court confines the release to what was intended to be released. (St. § 145.) **97.**

VI. Equity will relieve where an instrument has been delivered up or cancelled, under a mistake of a party, and in ignorance of the facts material to the rights under it. (St. § 167.) **98.**

VII. Equity will also supply defects in the execution of powers, on the ground of

mistake, in the cases mentioned in the preceding chapter under the head of Accident. TIT. I.  
CAP. II.

**99.**

VIII. Equity will rectify a clear mistake or omission in a will, if it is apparent on the face of the will. But parol evidence is generally inadmissible. It is admitted, however, in certain cases of mistake in the name or description of the devisee or legatee. (See 1 Jarm. on Wills, 2nd ed. 361-3; Wigram on Wills, 51; *Mostyn v. Mostyn*, 5 H. L. Cas. 155; St. § 179-181; *Doe d. Hiscocks v. Hiscocks*, Tud. Lead. Cas. Real Prop. 2nd ed. 819.) **100.**

IX. Equity will grant relief, where a mistake in a written contract is fairly presumable from the nature of the transaction. And hence, where there has been a joint loan to two or more obligors, and they are only made jointly liable, the Court will make the bond joint and several. (St. § 163, 164; *Wilson v. Wilson*, 5 H. L. Cas. 40.) **101.**

X. An instrument may be entirely set aside on the ground of mistake or fraud. Avoidance  
of a written  
instrument  
on the  
ground of  
mistake or  
fraud. (See St. § 161; *Phillipson v. Kerry*, 32 Beav. 628; *Price v. Ley*, 4 Gif. 235.) And a voluntary deed of gift may be ordered to be cancelled on either of those grounds, and

TIT. I.  
CAP. II.

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the money ordered to be given back to the donor. (*Lister v. Hodgson*, L. R. 4 Eq. 30.)

And in cases within the Statute of Frauds, it is an easier matter totally to avoid an agreement, than to vary it; for, in the former case, the Statute of Frauds has no influence whatever; since "it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind." (Sugd. V. & P. 10th ed. ch. 3, s. 8, pl. 32.)

**102.**

## CHAPTER III.

## OF ACTUAL FRAUD.

THE modes of fraud are infinite; and "it has been said, that Courts of Equity have, very wisely, never laid down, as a general proposition, what shall constitute fraud, or any general rule, beyond which they will not go, upon the ground of fraud, lest other means of avoiding the equity of the Courts should be found." (St. § 186.) In accordance with the spirit of this remark, the writer abstains from attempting to give a definition of fraud *in general*. It is usually and accurately divided, however, into two large classes, designated, defined, and treated of under the names of Actual Fraud and Constructive Fraud. **103.**

TIT. I.  
CAP. III.

Unsafe to  
define fraud  
*in general*,  
or the ex-  
tent of reme-  
dial equity  
on the  
ground of  
fraud.

An actual fraud may be defined to be something said, done, or omitted, by a person with the design of perpetrating what he must have known to be a positive fraud. **104.**

Definition  
of actual  
fraud.

A Court of Equity will not entertain jurisdiction to set aside a will obtained by fraud, or establish a will suppressed by fraud; for in such cases, the proper remedy

Jurisdiction  
in cases of  
fraud.

**TIT. I.** is exclusively vested in the Court of Probate.  
**CAP. III.** (St. § 184, and note; 1 Wms. on Executors, 5th ed. 341; 2 Steph. Com. 202-5; *Jones v. Gregory*, 4 Gif. 468; 2 D. J. & S. 83.) But where the fraud does not go to the whole will, but only to some particular clause, or where the fraud is in unduly obtaining the consent of the next of kin to the probate, Courts of Equity will lay hold of these circumstances to declare the executor a trustee for the next of kin. (St. § 440.) **105.**

In a great variety of other cases, fraud is cognizable at Law; as in cases of fraud in the sale of chattels personal: and in some of these cases adequate relief could be, and constantly is, obtained at Law. (St. § 184, and note.) **106.**

Evidence of fraud.

It is a rule as well in Courts of Law as in Courts of Equity, that fraud is not to be presumed. But, on the other hand, neither at Law nor in Equity is positive proof of fraud indispensably necessary. A Court of Equity, however, would act on a lower degree of proof than that which would be required in a Court of Law. (See St. § 190.) **107.**

When a case is based on fraud, the fraud must be proved, and no relief will be given in the suit in which such a case is made, on

any different grounds. But where material allegations of fraud are proved, the plaintiff will obtain relief although other allegations of fraud are not proved. (*Moxon v. Payne*, L. R. 8 Ch. Ap. 881, 887.) **108.** TIT. I.  
CAP. III.

It would be impossible, and unnecessary if it were possible, to enumerate all the different instances in which Courts of Equity will grant the relief on the ground of actual fraud. We shall only notice a few of them under these two heads: **109.**

I. Of frauds which receive that denomination from a consideration of the conduct of the guilty parties, irrespective of any peculiarity in the condition of the injured parties. **110.** Division of  
actual  
frauds.

II. Of frauds which receive that denomination mainly or in a great measure from a consideration of the peculiar condition of the parties upon whom they are practised. **111.**

I.—1. Misrepresentation, whether by word or deed, constitutes fraud. (St. § 191, 192; *Jennings v. Broughton*, 5 D. M. & G. 126; *Kay v. Smith*, 21 Beav. 522.) Equity will not interfere, however, if the fraud was not in the transaction which creates the contract, but in a distinct unconnected transaction. (*Rolt v. White*, 3 D. J. & S. 360.) Nor will it interfere if the misrepresentation was I. First class  
of actual  
frauds.  
1. Misrepresentation.



TIT. I.  
CAP. III.

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in a trifling or immaterial point, or if no injury arose from it. (St. § 191, 195, 196, 203; *Pulsford v. Richards*, 17 Beav. 96.) For, in the first case, the evils of litigation would be far greater than the injury occasioned; and, as to the second case, Courts of Equity do not profess to punish guilt, but to redress wrongs. And Equity will not interfere if the party was not misled by the misrepresentation (St. § 202; *Nelson v. Stocker*, 4 D. & J. 458); because, in that case, he was not injured by it. Nor will the Court interpose if the misrepresentation was vague and inconclusive (St. § 192); or if it merely amounted to the common language of puffing and commendation of things sold (St. § 291); or if it was in a matter of opinion or fact equally open to the inquiry of both parties, and in regard to which neither could be presumed to trust the other (St. § 191, 197, 198); or if the party injured may properly impute the loss to a want of ordinary care or discretion on the part of himself or his agents (St. § 199, 200 a; but see *Reynell v. Sprye*, 1 D. M. & G. 656, 710). For, the Court does not sit to redress injuries which the injured parties, by ordinary and proper care, could have prevented. It is no part of Equity Juris-

prudence to encourage carelessness. So great, however, is the confidence which is naturally reposed by a client in his solicitor, and so important is it to guard it against abuse, that, where a solicitor induces his client to execute a deed upon false and plausible representations, the Court will order the deed to be delivered up to be cancelled. (*Vorley v. Cooke*, 1 Gif. 230; *Ogilvie v. Jeaffreson*, 2 Gif. 353.) **112.**

Misrepresentation is a ground of relief, whether the party who made the assertion or intimation knew it to be false, or made it without knowing whether it was true or false. (St. § 193; *Pulsford v. Richards*, 17 Beav. 95; *Rawlins v. Wickham*, 1 Gif. 355; 3 D. & J. 304; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64; *Hart v. Swaine*, L. R. 7 Ch. D. 42.) So that if a person, whether wilfully or not, makes a false representation to another, with a reasonable ground for supposing that he or a third person would act upon such representation, and he or such third person does act upon it, and is misled thereby, the person misleading will be made answerable for it. (*Hutton v. Rossiter*, 7 D. M. & G. 9, 23, 24; *Slim v. Croucher*, 2 Gif. 37; 1 D. F. & J. 518; *Barry v. Croskey*, 2 Johns. & H. 1; *Ramshire v.*

TIT. I.  
CAP. III.

TIT. I.  
CAP. III.

*Bolton*, L. R. 8 Eq. 294.) And where a person has been induced to enter into a contract by a material misrepresentation of the other party, he is entitled to have the contract set aside, and not merely to have the representation made good. (*Rawlins v. Wickham*, 1 Gif. 355; 3 D. & J. 304; *Trail v. Baring*, 4 Gif. 485; *Charlesworth v. Jennings*, 34 Beav. 95; *Huygarth v. Wear- ing*, L. R. 12 Eq. 320; *Hart v. Swaine*, L. R. 7 Ch. D. 42.) **112a.**

A contract induced by fraud is not void, but only voidable at the option of the party defrauded; and though the party who was guilty of the fraud cannot enforce it, yet other persons may, in consequence of it, acquire interests and rights which they may enforce against the party defrauded. (*Oakes v. Turquand*, L. R. 2 H. L. 325, 346.) **113.**

If a person, through the fraud of another, has executed a deed, or signed a receipt, containing a representation, he must suffer from the fraudulent use made of such deed or receipt by such other person, rather than a third person who has, in the ordinary course of business, without negligence or default, trusted to the document containing such representation. (*Hunter v. Walters*, L. R. 7 Ch. Ap. 75.) **114.**

A person may avail himself of what has <sup>TIT. I.</sup> been obtained by the fraud of another, if <sup>CAP. III.</sup> he is not only innocent of the fraud, but has given some valuable consideration. (*Scholefield v. Templer*, 4 D. & J. 433; *Hunter v. Walters*, L. R. 7 Ch. Ap. 75.) **115.**

2. If a person conceals facts and circum- <sup>2. Conceal-</sup> stances which he is under some legal or <sup>ment.</sup> equitable obligation to communicate to the other, it amounts to a fraud, for which Equity will grant relief. (St. § 204, 207, 215, 217, 220; 2 Sp. 765; *Pulsford v. Richards*, 17 Beav. 94-6.) As, if a vendor sells an estate, knowing that he has no title to it, or that there are incumbrances on it, of which the purchaser is ignorant (St. § 208); or if the insured does not communicate to the underwriters all facts and circumstances which increase the risk (St. § 216); or if a lessee has obtained a lease of a furnished house on an implied representation that he was of full age; in which case it will be declared void at the option of the lessor (*Lemprière v. Lange*, L. R. 12 Ch. D. 675). **116.**

And if a person leases lands, and he knows, and the lessee does not know, that as to a part the lessor has no title, and the lessor does not disclose that fact, the lessee may set aside or repudiate the lease. And

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CAP. III.

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he may refuse the part to which there is no title, and elect to keep the remainder. And if there is a covenant for title, express or implied, and an action is brought for rent, he may claim damages, for breach of the covenant, by way of counterclaim. (*Mostyn v. West Mostyn Company*, L. R. 1 C. P. D. 145.)  
**117.**

But a purchaser is not bound to communicate his knowledge of the value of the property to the vendor (St. § 207, note; *Walters v. Morgan*, 3 D. F. & J. 718); for it is the business of the vendor to know and sufficiently to estimate the worth of his own property. Thus, if A., knowing that there is a mine in the land of B., of which he knows B. to be ignorant, should conceal his knowledge of the fact, and enter into a contract to purchase the estate of B., for a price which the estate is worth without considering the mine, the contract would be good. (St. § 205.) **118.**

In many cases, the maxim *caveat emptor* is applied; and unless there is some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the purchaser is bound, notwithstanding there may be material intrinsic defects in it known to the vendor,

and unknown to the purchaser. (St. § 212.) TIT. I.  
CAP. III.  
**119.**

*In foro conscientiae*, each party is bound to communicate to the other his knowledge of all material facts, not discoverable by the other, or of which he knows the other to be ignorant. For this is required by the golden maxim, that we should do unto others as we would that they should do unto us. But if Equity were to attempt to enforce the observance of so broad a rule, a far greater inconvenience would ensue than that which is now experienced. For it would often be a matter of doubt with the party wronged, whether the other was really aware of the defect or advantage which he did not disclose. And, frequently, that could only be ascertained from his admissions or denials in a suit. So that, in order to determine this, proceedings for relief against fraud would often be taken in total uncertainty as to the existence of that knowledge, which was of the very essence of the supposed fraud, and absolutely necessary to be proved before any ground for relief could be said to exist. And in many cases there would be the same difficulty in ascertaining whether the defect or advantage, admitting it to be known to the one party,

TIT. I. was or was not disclosed by him to the  
CAP. III. other. **120.**

To draw a distinction which would, perhaps, give as much effect to the principle of sound morals, as would be compatible with avoiding frequent and fruitless litigation, and the encouragement of carelessness and negligence, the true course would seem to be, to hold that Equity will grant relief, if a person does not disclose any material fact, which, from the nature of the case, he must have known, and which the other party could not be expected to discover with the care ordinarily used in similar transactions. **121.**

3. Inadequacy.

3. Mere inadequacy of price, or any other inequality in the bargain, does not constitute by itself a ground to avoid it. (St. § 244; *Abbott v. Swoorder*, 4 De G. & S. 448; *Harrison v. Guest*, 6 D. M. & G. 424.) For the value of things is always fluctuating, and dependent on numberless circumstances. Besides, a man may be induced by difficulties or exigencies, or for other reasons, to part with his property at a particular time, for less than that for which another would have sold it. (St. § 545.) And perhaps the lowness of the price may have been the only inducement to the purchaser to make

the purchase ; and he may have simply accepted the proposals of the vendor, instead of being the originator of the transaction, or of being actively concerned in negotiating it, like a man whose design is to gain a fraudulent advantage over another. **122.**

TIT. I.  
CAP. III.

Still, however, there may be such an unconscionableness or inadequacy in the bargain, as to shock the conscience, and amount to conclusive evidence of imposition or some undue influence: and in such a case, Courts of Equity will interfere on the ground of fraud. And where there are other ingredients of a suspicious nature, gross inadequacy must furnish the most vehement presumption of fraud. (St. § 246 ; see remarks of Lord Cranworth, C., in *Harrison v. Guest*, 6 D. M. & G. 424.) As, if proper time for deliberation is not allowed the party injured ; if he is importunately pressed ; if those in whom he placed confidence make use of strong persuasion ; if he is suddenly drawn into an act, without being fully aware of the consequences ; if he is not permitted to consult disinterested friends or counsel, before he is called upon to act, in circumstances of sudden emergency or unexpected right and acquisition ; if he is an illiterate person,

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**TIT. I.**  
**CAP. III.**

and advantage has been taken of his necessities ; or if he is a person of weak understanding. (St. § 251 ; *Cockell v. Taylor*, 15 Beav. 103, 115 ; *Longmate v. Ledger*, 2 Gif. 157 ; *Clark v. Malpas*, 31 Beav. 80 ; 4 D. F. & J. 401 ; *Baker v. Monk*, 33 Beav. 419.) But Equity will not relieve where the parties cannot be placed *in statu quo*. Such relief, for instance, will not be given in the case of marriage settlements ; inasmuch as the Court cannot unmarry the parties. (St. § 250.) **123.**

Where a purchase is set aside for inadequacy of consideration, the conveyance will be ordered to stand as a security for what has been advanced. (*Longmate v. Ledger*, 2 Gif. 157 ; *Douglas v. Culverwell*, 3 Gif. 251 ; *Baker v. Monk*, 33 Beav. 419.) **124.**

Deeds of the nature of family arrangements are exempt from the rules as to the adequacy of the consideration applicable to other deeds ; the consideration in such cases being compounded partly of value and partly of natural affection ; and it is not necessary that there should be any rights in dispute, in order to uphold them. (*Persee v. Persee*, 7 Cl. & Fin. 279 ; *Williams v. Williams*, 2 Dr. & Sm. 378 ; L. R. 2 Ch. Ap. 294. As to deeds of this nature, see also *Stapilton v.*

*Stapilton*, 2 Lead. Cas. Eq. 2nd ed. 684 *et seq.*; *Dimsdale v. Dimsdale*, 3 Drew. 556, 569-571; *Greenwood v. Greenwood*, 2 D. J. & S. 28.) **125.**

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CAP. III.

4. Where gifts and legacies are bestowed on persons, on condition that they shall marry with the consent of parents, guardians or other confidential persons, Courts of Equity will not suffer the manifest object of the condition to be defeated by the fraudulent, corrupt, or unconscientious refusal of the parties whose consent is required to the marriage. (St. § 257.) **126.**

4. Refusal of consent to a marriage.

II. There are other frauds which receive that denomination mainly or in a great measure from the consideration of the peculiar condition of the injured parties. **127.**

II. Second class of actual frauds.

With regard to these—

1. In the case of contracts or other acts, however solemn, of persons who are idiots, lunatics, or otherwise of unsound mind, wherever, from the nature of the transaction, there is not evidence of entire good faith, or it is not seen to be just in itself or for the benefit of those persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests. But where there is entire good faith, and the contract or other act is for the benefit of such per-

1. On persons of unsound mind.

TIT. I.  
CAP. III.

sons, as to provide them with necessaries, there Courts of Equity will uphold it, as well as Courts of Law. (St. § 227-229; *Manby v. Bewicke*, 3 K. & J. 342.)  
**128.**

2. On in-  
toxicated  
persons.

2. If a person, at the time of entering into a contract or doing an act, was so excessively drunk as to be deprived of the use of his understanding; or if there was any contrivance or management to lead him to drink, or some unfair advantage taken of his intoxication, Courts of Equity will not lend their assistance to the person who obtained an agreement or deed from him, when so intoxicated, but will assist the latter in getting rid of it, on account of the fraud of the other party in obtaining such agreement or deed from a person in such a state or by such means. (See St. § 230-232.) **129.**

3. On per-  
sons of weak  
understand-  
ing.

3. The contracts and other acts of persons who are of weak understanding will be held void in Equity if the nature of such contracts or other acts justifies the conclusion that the party has been imposed on, circumvented, or over-reached by cunning, artifice, or undue influence. (See St. § 234-8; *Longmate v. Ledger*, 2 Gif. 157; *Nottidge v. Prince*, 2 Gif. 246.) But to

constitute undue influence, there must be either fraud or coercion by fear; and the burden of proving that the will of a person of sound mind was executed under undue influence is on the party who alleges it. (*Boyse v. Rossborough*, 6 H. L. Cas. 2, 33, 34, 49.) **130.**

4. Where a party is not a free agent, and is not equal to protect himself, a Court of Equity will protect him (a). Hence Equity will relieve against acts done under duress, or under the influence of threats or of real or imaginary terrors, calculated to deprive a person of free agency. (St. § 239; *Boyse v. Rossborough*, 6 H. L. Cas. 2, 49; *Williams v. Bayley*, L. R. 1 H. L. 200.) And it watches with the utmost jealousy all contracts made by a person while under imprisonment; and if there is the slightest ground to suspect oppression or imposition, it will set the contract aside. And, in like manner, circumstances of extreme necessity and distress may so entirely overpower free agency as to justify the Court in setting aside a contract on account of some oppres-

TIT. I.  
CAP. III.

4. On persons who are not free agents: but under duress, or in fear,

or in prison or extreme necessity.

(a) The writer submits that this principle ought, in accordance with reason and justice, to have been applied to the case of *Re Metcalfe's Trusts*, 2 D. J. & S. 122, the case of a professed nun.

TIT. I. sion or fraudulent advantage attendant on  
CAP. III. it. (St. § 239.) **131.**

5. On infants.

5. Infants may, even at Law, bind themselves in some cases, by contracts for necessities suitable to their degree and quality, or by acts which the Law requires them to do. But in general, where a contract may be either for the benefit or to the prejudice of an infant, he may avoid it, as well at Law as in Equity. Where it can never be for his benefit it is utterly void (*a*). **132.**

By the statute 37 & 38 Vict. c. 62, s. 1, it is enacted that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied, or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void. Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of Common Law or Equity, enter, except such as now by Law are voidable." **132a.**

By s. 2, "No action shall be brought whereby to charge any person upon any

(*a*) See Smith's *Manual of Common Law*, 8th ed. Index, "Infants"; St. § 240, 241.

promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age" (a). **132b.**

By s. 3, "This Act may be cited as 'The Infants' Relief Act, 1874.'" **132c.**

It may here be observed that when one of two innocent persons must suffer by the fraud of a third person, that person shall be the sufferer who by his conduct, however innocently, put it in the power of the third person to commit the fraud. (*Adsetts v. Hives*, 33 Beav. 52; *Hunter v. Walters*, L. R. 11 Eq. 292.) **133.**

Case where  
one of two  
innocent  
persons  
must suffer.

(a) This applies to ratifications made after the passing of the Act, even of contracts made before that time. *Ex parte Kibble*, *In re Onslow*, L. R. 10 Ch. Ap. 373.

## CHAPTER IV.

## OF CONSTRUCTIVE FRAUD.

TIT. I.  
CAP. IV.

## Definition.

CONSTRUCTIVE frauds are acts, statements, or omissions, which operate as virtual frauds, on individuals, or, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish or evil design, or may amount, in the opinion of the person chargeable therewith, to nothing more than what is justifiable or allowable. **134.**

Four classes  
of construc-  
tive frauds.

The cases which will be noticed in the present Chapter may be arranged in four classes—

I. Frauds  
on public  
policy.

I. Relief is granted, on the ground of constructive fraud upon public policy, against agreements, provisions, and transactions, which, although they may not operate as frauds upon individuals, would, if generally permitted, be prejudicial to the welfare of the community. **135.** Thus,

1. Marriage  
brokage  
contracts.

1. Marriage brokage contracts, which are

agreements whereby a person engages to give another a remuneration, if he will negotiate a marriage for him, are void, as tending to introduce matches which are ill-advised, and not based on mutual affection, and therefore against public policy. And they are so utterly void that they are deemed incapable of confirmation; and money paid under them may be recovered back again, in a Court of Equity, whether the marriage is an equal or an unequal one. (St. § 260-3; 2 Lead. Cas. Eq. 2nd ed. 178 *et seq.*) **136.**

TIT. I.  
CAP. IV.

2. The same rules are applied to bonds and other agreements entered into as a reward for using influence over another, to induce him to make a will for the benefit of the obligor (St. § 265); for such contracts encourage a spirit of artifice and scheming, most prejudicial to the moral tone of those in whom it exists; and they tend to deceive and injure others. **137.**

2. Agree-  
ments to  
influence  
testators.

3. On a similar ground, secret contracts made with parents, or guardians, or other persons standing in a peculiar relation to one of the parties, whereby, on a treaty of marriage, they are to receive remuneration for promoting the marriage or giving their consent to it, are held void. (St. § 266,

3. Contract  
to facilitate  
marriages.



TIT. I. 267; 2 Lead. Cas. Eq. 2nd ed. 178, *et seq.*)  
CAP. IV. **138.**

4. Contracts or conditions in restraint of marriage or inconsistent with the duty of married life.

4. On the other hand, a contract is void if it is expressly in restraint of marriage generally, or if it is so restricted that it is probable that it may virtually operate in restraint of marriage generally (see St. § 274, 276-283; *Scott v. Tyler*, 2 Lead. Cas. Eq. 2nd ed. 105, 198 *et seq.*): as, that a woman shall not marry a man who has not an estate of 500*l.* a year (St. § 280), or shall not marry till fifty years of age, or shall not marry any person residing in the same town, or any person who is a clergyman, a physician, or a lawyer, or any person except of a particular trade or occupation (St. § 283) (*a*). **139.**

A contract or condition imposed on a married woman to cease to reside at a place where her husband then resides is bad. (*Wilkinson v. Wilkinson*, L. R. 12 Eq. 604.)

**140.**

5. Contracts or conditions in restraint of trade.

5. So, contracts and conditions in general restraint of trade, or beyond what is reasonably necessary for the protection of the party

(*a*) As to conditions, conditional limitations, and special limitations in restraint of marriage, see the writer's *Compendium of the Law of Property*, 5th ed. par. 198-223; 2 Lead. Cas. Eq. 2nd ed. 178 *et seq.*

seeking protection, are void, as tending to discourage industry, enterprise, and just competition. But a person may be restrained from carrying on trade in or within a certain distance from a particular place, or with particular persons, or for a reasonable limited time. And a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret. (St. § 292; *Benwell v. Inns*, 24 Beav. 307; *Harms v. Parsons*, 32 Beav. 328; *Catt v. Tourle*, L. R. 4 Ch. Ap. 654; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59.) **141.**

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CAP. IV.

6. Where, pending a bill in parliament, an agreement is entered into to produce a false impression, or to mislead or suppress inquiry, or to withdraw public opposition thereto, it will be held void as a fraud upon parliament, as well as upon the public at large. (St. § 293 a.) **142.**

6. Fraud in relation to a bill in parliament.

7. Contracts for the buying, selling, or procuring of public offices are void, as tending to introduce into public offices persons who are unfit for them in respect of character and other qualifications. (St. § 294, 295.) **143.**

7. Contracts for public offices.

8. So are agreements for the suppression of criminal prosecutions (St. § 294), as

8. Suppression of criminal proceedings.

**TIT. I.  
CAP. IV.**

tending to weaken the beneficial preventive influence of the Law, by diminishing the certainty of punishment. **144.**

9. Champerty and corrupt considerations.

9. So are contracts which have a tendency to encourage champerty (St. § 294; *Reynell v. Sprye*, 1 D. M. & G. 660), and agreements, bonds, and securities founded on corrupt considerations, that is, on the commission of what is contrary to the moral or municipal Law, or on the evasion thereof. (St. § 294-7.) And where contracts are intended to carry out an immoral purpose (as in the case of a house let for a brothel), even though that purpose do not appear on the face of the instrument, none of the stipulations comprised therein will be enforced. (*Smith v. White*, L. R. 1 Eq. 626.)

**145.**

Distinction between void and voidable transactions as regards confirmation.

Wherever any contract or conveyance is void, either by a positive Law or upon principles of public policy, it is deemed incapable of confirmation; it being a maxim, *Quod ab initio non valet, in tractu temporis non convalescit*. But where it is merely voidable, or turns upon circumstances of undue advantage, surprise, or imposition, there it is valid until rescinded, and if it is deliberately and upon full examination confirmed by the parties, it will remain valid. (St.

§ 306. See *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64.) **146.** TIT. I.  
CAP. IV.

And where a party to a deed acts upon it in part, that confirms it altogether, in the absence of evidence of a contrary intent. (*Jarratt v. Aldam*, L. R. 9 Eq. 463; *Davies v. Davies*, L. R. 9 Eq. 468.) **147.**

II. With regard to transactions *inter vivos*, where a reasonable confidence is reposed in another person, or a peculiar influence is possessed by him in consequence of standing in a confidential relation, and he makes use of that confidence or that influence to obtain an advantage to himself at the expense of the party confiding in him or under his influence, he will not be permitted to retain any such advantage, however unimpeachable the transaction would have been if no such confidence had been reposed, or no such confidential relation had existed. (*Huguenin v. Baseley*, 2 Lead. Cas. Eq. 2nd ed. 462 *et seq.*; *Sharp v. Leach*, 31 Beav. 491; *Broun v. Kennedy*, 33 Beav. 133; see also *Rhodes v. Bate*, 4 Gif. 670; L. R. 1 Ch. Ap. 252; *Tate v. Williamson*, L. R. 1 Eq. 528; 2 Ch. Ap. 55; *Moxon v. Payne*, L. R. 8 Ch. Ap. 881.) But it has been held that this does not apply to a devise or bequest. To set aside a testamentary disposition on

II. Frauds  
in the case  
of persons  
in the confi-  
dential rela-  
tions of—

TIT. I.  
CAP. IV.

account of undue influence, it must amount to this—that the testator was not a free agent. (*Parfitt v. Lawless*, L. R. 2 Prob. & M. 462.) **148.**

1. Parent or person standing in loco parentis or relative having influence.

1. Contracts and conveyances whereby benefits are secured by children to their parents or to persons who stand *in loco parentum*, or dispositions made by young persons in favour of their relatives who have an influence over them, if not entered into with scrupulous good faith, and reasonable, under the circumstances, will be set aside, unless third persons have acquired an interest under them. (St. § 309; *Hoghton v. Hoghton*, 15 Beav. 278; *Espey v. Lake*, 10 Hare, 260; *Wright v. Vanderplank*, 2 K. & J. 1; 8 D. M. & G. 133; *Dimsdale v. Dimsdale*, 3 Drew. 556, 558, 577; *Baker v. Bradley*, 7 D. M. & G. 597, 620; *Potts v. Surr*, 34 Beav. 543; *Berdoe v. Dawson*, 34 Beav. 603; *Sercombe v. Sanders*, 34 Beav. 382; *Chambers v. Crabbe*, 34 Beav. 457; *Turner v. Collins*, L. R. 7 Ch. Ap. 329; *Kempson v. Ashbee*, L. R. 10 Ch. Ap. 15.) In such cases, it must be proved, first, that the deed was the real and actual deed of the child or young person, and was intended by him to have the operation it has; and, secondly, that such intention was fairly

produced. And where a child, recently <sup>TIT. I.</sup> after attaining majority, makes over pro- <sup>CAP. IV.</sup> property to the father, without consideration, or for an inadequate consideration, Equity will require the father to be able to show that the child was really a free agent, and had adequate and independent advice. (*Savery v. King*, 5 H. L. Cas. 627, 655; *Bury v. Oppenheim*, 26 Beav. 594; *Davies v. Davies*, 4 Gif. 417.) And if an estate held in trust for a father for life, the remainder to his son in fee, is sold by the father and son immediately on the son coming of age, and the whole purchase-money is paid to the father, there, if the assistance of the Court is required by the purchaser to complete the transaction, its straightforwardness must be proved. (*Hannah v. Hodgson*, 30 Beav. 19.) **149.**

If a person seeking to impugn such transactions is not reasonably prompt in so doing, after the influence has ceased, no relief will be given, unless there is actual fraud. (*Turner v. Collins*, L. R. 7 Ch. Ap. 329; *Kempson v. Ashbee*, L. R. 10 Ch. Ap. 15.) **150.**

2. During the existence of guardianship, <sup>2. Guardian.</sup> the relative situation of the parties occasions a general inability to deal with each other.

**TIT. I.**  
**CAP. IV.**

And Courts of Equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, if the intermediate period is short; especially if all the duties attached to the office have not ceased, or if the estate still remains in some sort under the control of the guardian; unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most absolute good faith on the part of the guardian. (St. § 317-320; *Wright v. Vanderplank*, 2 K. & J. 1.) **151.**

But when the guardianship has entirely ceased, and a fair and full settlement of all transactions growing out of it has been made, and a sufficient time has intervened to allow the ward to feel completely independent of the guardian, there is then no objection even to a bounty being conferred upon the latter. (St. § 320.) **152.**

3. Quasi guardians, advisers, or ministers of religion.

3. The same principles are applied to persons standing in the relation of quasi guardians, or confidential advisers, or ministers of religion (*Nottidge v. Prince*, 2 Gif. 246), and to every case where influence is acquired and abused, where confidence is reposed and betrayed (*Smith v. Kay*, 7 H. L. Cas. 750, 771, 778, 779; *Brown v. Kennedy*, 33

Beav. 133; *Graham v. Johnson*, L. R. 8 Eq. 36; St. § 319). **153.** TIT. I.  
CAP. IV.

4. A solicitor is not incapable of contract-  
ing with his client; but as the relation must give rise to great confidence in the solicitor, or to very strong influence over the client, the relation must be dissolved before the contract, or the whole onus of proving the fairness and propriety of the transaction will be thrown on the solicitor, or he must show that the client had sufficient advice and assistance to relieve him from the pressure arising from the relation of solicitor and client, and that he has taken no advantage of his professional position, but that he has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger. (Sugd. Concise View, 548; St. § 310-313; *Holman v. Loynes*, 4 D. M. & G. 270; *Tomson v. Judge*, 3 Drew. 306; *Savery v. King*, 5 H. L. Cas. 627, 655, 656; *Waters v. Thorn*, 22 Beav. 547; *Spencer v. Topham*, 22 Beav. 573; *Cowdry v. Day*, 1 Gif. 316; *Gresley v. Mousley*, 1 Gif. 450; 4 D. & J. 78; *Pearson v. Benson*, 28 Beav. 598; *Gibbs v. Daniel*, 4 Gif. 1.) And a solicitor who is an agent for a sale cannot become the purchaser, without fully explaining to the parties interested



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CAP. IV.

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all the circumstances of the sale and of the value of the property ; because his duty and his interest are in conflict. (*In re Bloye's Trust*, 1 Mac. & G. 494, 497.) And if a solicitor can show that he is entitled to purchase, yet if, instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase can stand. (*Lewis v. Hillman*, 3 H. L. Cas. 630.) **154.**

As a general rule, a solicitor shall not accept a gift, or in any way whatever, in respect of the subject of any transaction between him and his client, make a gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled. (4 Cruise T. 32, c. 26, § 35 ; St. § 312 ; *Moss v. Bainbrigge*, 18 Beav. 478 ; 6 D. M. & G. 292 ; *Tomson v. Judge*, 3 Drew. 306 ; *Re Holmes' Estate*, 3 Gif. 337 ; *Nanney v. Williams*, 22 Beav. 452 ; *Walker v. Smith*, 29 Beav. 394 ; *Bank of London v. Tyrrell*, and *Tyrrell v. Bank of London*, 27 Beav. 273 ; 10 H. L. Cas. 26 ; *O'Brien v. Lewis*, 4 Gif. 221.) On the above principle, an agreement on the part of a client to allow a solicitor a commission of so much per cent. on a fund in Court, as a remuneration for recovering

the fund or employing another solicitor to recover it, was void, as contrary to the policy of the Law. (Tit. I. CAP. IV. *Strange v. Brennan*, 15 Sim. 346.) And an agreement by a client to allow his solicitor interest on his bill of costs, could not be maintained—at all events, not unless the solicitor informed the client that the Law allowed no such charge, or the client acquiesced, after the termination of the relation, and after proper advice upon the subject. (*Lyddon v. Moss*, 4 D. & J. 104.) But a deed executed by a client in favour of his solicitor, if voidable, may be confirmed by the will of the client. (*Stump v. Gaby*, 2 D. M. & G. 623. But see *Waters v. Thorn*, 22 Beav. 547, 559.) **155.**

An agreement between a solicitor and client, that a gross sum shall be paid for costs for business already done, is valid. But an agreement to pay a gross sum for business hereafter to be done, was void. And if a solicitor takes a gross sum for his services, without an account, he should preserve evidence of the fairness of the agreement, and that the client had good advice, or had full opportunity and capacity to judge for himself. (*In re Newman*, 30 Beav. 196; *Morgan v. Higgins*, 1 Gif. 277.) **156.**

But these paragraphs must be read

**TIT. I.** subject to the stat. 33 & 34 Vict. c. 28.  
**CAP. IV.** **157.**

If a solicitor and mortgagee obtains a conveyance from the mortgagor, and the mortgagor is a man in humble circumstances without any legal advice, the onus of justifying the transaction, and showing that it was a fair and right transaction, is thrown upon the mortgagee. (*Prees v. Coke*, L. R. 6 Ch. Ap. 645, 649.) **158.**

5. Doctor. 5. Similar principles apply to a medical adviser and his patient. (St. § 315.) **159.**

6. Agent. 6. An agent will not be permitted to reap any advantage by becoming secret vendor or purchaser of property which he is authorized to buy or sell for his principal. (St. § 315.) So that if an agent sells his own property to his principal, as the property of another, without disclosing the fact, or if an agent purchases the goods of his principal in another name, however fair the transaction may be, the principal may either repudiate it, or may claim any profit made by the agent; in order to deter agents from placing themselves in a state of temptation to benefit themselves, rather than their employers. And if an agent employed to purchase for another purchases for himself, he will be considered as the trustee of his employer, at

the option of the latter. (St. § 316, 1211a; *Bentley v. Craven*, 18 Beav. 75; *Bank of London v. Tyrrell*, 27 Beav. 273; *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; *Wentworth v. Lloyd*, 32 Beav. 467; *Kimber v. Barber*, L. R. 8 Ch. Ap. 56; *De Bussche v. Alt*, L. R. 8 Ch. D. 286.) And in all transactions directly and openly entered into between principal and agent, the utmost good faith is required; so that the agent must not conceal any facts within his knowledge which might influence the judgment of his principal as to the price or value. (St. § 315, 316 a; see *Dally v. Wonham*, 33 Beav. 154.) **160.**

7. To guard against the danger of any <sup>7. Trustees.</sup> advantage being taken by a trustee, and to remove all temptation from him, he is never permitted to obtain any profit or advantage to himself in managing the concerns of his *cestui que trust*, but whatever benefits or profits are obtained will belong to the *cestui que trust*. And he is not allowed to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid if it were a case of guardianship. (St. § 321, 322; see *infra*, Tit. II. c. VI. div. IV. and c. VII. div. XII.) A trustee cannot purchase the trust estate from himself or from his co-trustee.

TIT. I.  
CAP. IV.

And if a purchase is made of the trust estate by the trustee from his *cestui que trust*, although at a public auction, unless there has been no fraud, concealment, or advantage on the part of the trustee, and no want of protection and security on the part of the *cestui que trust*, the *cestui que trust* may require a re-conveyance or a re-sale; and, if the re-sale produces more than the trustee gave, the *cestui que trust* may repudiate the first sale, and adopt the re-sale; if less, he may affirm the first sale. (Sugd. V. & P. 14th ed. 69, 691-4; Lewin on Trusts, 4th ed. 335-342; St. § 322; 2 Sp. 943, 944; *Smedley v. Varley*, 23 Beav. 358; *Denton v. Donner*, 23 Beav. 285; 1 Lead. Cas. Eq. 2nd ed. 139.)  
**161.**

S. Counsel,  
agents,  
trustees,  
and solic-  
itors of a  
bankrupt or  
insolvent,  
auctioneers,  
and credi-  
tors.

8. In order to prevent the temptation of availing themselves of information for their own benefit, and concealing it from those for whom they act, the same restriction on the right of purchase applies to other persons standing in similar confidential situations; as to counsel, agents, trustees, and solicitors of a bankrupt's or insolvent's estate, auctioneers, and creditors, who have been consulted as to the sale. (St. § 322; 2 Sp. 943; *Pooley v. Quilter*, 2 D. & J. 327.)  
**162.**

9. And it may be laid down as a general rule with regard to executors or administrators, that they will not be permitted under any circumstances to derive a benefit from the manner in which they transact the business of their office. (St. § 322; *Robinson v. Pett*, 2 Lead. Cas. Eq. 2nd ed. 206 *et seq.*) **163.**

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CAP. IV.

9. Executors  
or adminis-  
trators.

10. Entire good faith is required between debtor and creditor and sureties. And if a creditor does any act affecting the surety, or if he omits to do any act of duty which he is required to do by the surety, or is bound to do, and that act or omission may prove injurious to the surety, or if a creditor enters into any stipulations with the debtor, unknown to the surety, and inconsistent with the terms of the original contract, the surety may set up such contract as a defence to any proceeding against him, in a Court of Law or Equity. So that if a creditor stipulates with his debtor, in a binding manner, upon a sufficient consideration, to give further time for payment, without the consent of the surety, the latter will be thereby discharged, if the arrangement might be injurious to him. (St. § 324-6, 883, 883 a, note; *Rees v. Berrington*, 2 Lead. Cas. Eq. 2nd ed. 814 *et seq.*; *Tucker v. Laing*, 2 K. & J. 745; *Blest v.*

10. Debtor,  
creditor,  
and surety.

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CAP. IV.

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*Brown*, 3 Gif. 450; 4 D. F. & J. 367; *Strange v. Fooks*, 4 Gif. 408; *Oriental Financial Corporation v. Overend & Co.*, L. R. 7 Ch. Ap. 142; *Wilson v. Lloyd*, L. R. 16 Eq. 60.) But it has been held (improperly, as the writer, with great deference, submits), that a covenant not to sue the debtor, or a deed of release only amounting to such a covenant, and reserving the creditor's rights against the surety, does not discharge the surety. (*Green v. Wynn*, L. R. 4 Ch. Ap. 204.) And a conditional agreement for further time does not discharge the surety, when, from the agreement not being performed, the agreement does not become binding. (St. § 883 a, note.) It has been repeatedly held (but contrary to principle, as the writer submits), that the giving of time does not discharge the surety, if it is agreed between the creditor and the principal debtor, when further time is given, that the surety shall not be thereby discharged. (*Webb v. Hewitt*, 3 K. & J. 442; *Wyke v. Rogers*, 1 D. M. & G. 408; Lord Hatherley, C., in *Oriental Financial Corporation v. Overend & Co.*, L. R. 7 Ch. Ap. 150.) Mere delay on the part of the creditor, at least if some other equity does not intervene, unaccompanied with any valid contract for such delay, will

not amount to laches, so as to discharge the surety. (St. § 326 ; *Tucker v. Laing*, 2 K. & J. 745.) But the sureties are entitled to come into a Court of Equity, after a debt has become due, to compel the debtor, or any one who has given them an indemnity, to exonerate them from their liability by paying the debt. (St. § 327, 369 ; *Wooldridge v. Norris*, L. R. 6 Eq. 410 ; and see judgment in *Green v. Wynn*, L. R. 4 Ch. Ap. 207.)

**164.**

III. Relief will be granted in favour of those classes of persons of whom, from their peculiar circumstances, irrespective of any mental incapacity, undue advantage may readily be taken, even where the transaction could not be impeached if entered into by parties otherwise situated. (*Earl of Chesterfield v. Janssen*, 1 Lead. Cas. Eq. 2nd ed. 428 *et seq.*) **165.** Thus,

1. Bargains with expectant heirs will be set aside, unless the purchaser, on whom the *onus probandi* rests, can show that a full consideration was paid, or that the bargain was fully made known to and approved by the person to whose estate the expectant heir hoped to succeed ; because it is the policy of Equity to prevent designing men from taking advantage of persons whose

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III. Frauds  
in case of  
persons  
peculiarly  
liable to be  
imposed on.

1. Bargains  
with expect-  
tant heirs,



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interests are future, and therefore apt to be under-estimated or improvidently disposed of, especially by the necessitous, the thoughtless, and the young; and it is also the object of Equity to discourage transactions by which the intentions of the ancestor or other person from whom the property was expected are disappointed, and, by cutting off relief at the hands of strangers, to oblige the heir to disclose his difficulties at home. (See St. § 334-340, 343.) **166.**

If the heir, after being relieved from his necessities, absolutely and deliberately, and on full information as to his right of setting aside the bargain, confirms the transaction, or does any act by which the rights or property of the other party are injuriously affected, he will not be allowed to repudiate the bargain. (St. § 345, 346.) **167.**

The repeal of the usury laws has not altered the rules of the Court as to dealings with expectants. (*Croft v. Graham*, 2 D. J. & S. 155; *Miller v. Cook*, L. R. 10 Eq. 641, 646; *Tyler v. Yates*, L. R. 11 Eq. 265; 6 Ch. Ap. 665; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 490.) **168.**

and remain-  
der-men  
and rever-  
sioners.

The same relief was afforded to remaindermen and reversioners, unless the purchaser could show that a full consideration was

paid, or that the bargain was fully made known to and approved by their parents or other persons standing *in loco parentis*, who had the means of obviating the necessity of such an alienation of their future interests. (St. § 334-340; *Salter v. Bradshaw*, 26 Beav. 161; *St. Albyn v. Harding*, 27 Beav. 11; *Talbot v. Staniforth*, 1 Johns. & H. 484; *Foster v. Roberts*, 29 Beav. 467; *Jones v. Ricketts*, 31 Beav. 130; *Sharp v. Leach*, 31 Beav. 491; *Nesbitt v. Berridge*, 32 Beav. 282; *Dally v. Wonham*, 33 Beav. 154, 162; *Perfect v. Lane*, 3 D. F. & J. 369; *Beynon v. Cook*, L. R. 10 Ch. Ap. 389.) This doctrine applied to a charge as well as a sale, and notwithstanding the expectant was of mature age, and fully understood the nature of the transaction. And it was not necessary to show that he was in pecuniary distress; for that would be assumed. (*Bromley v. Smith*, 26 Beav. 644; *Tynte v. Hodge*, 2 Hem. & Mil. 287.) **169.**

By the stat. 31 Vict. c. 4 (passed 7th Dec. 1867) it is enacted that "No purchase made *bond fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of under-value" (s. 1); and that "the word 'purchase'

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in this Act shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired" (s. 2); and that "this Act shall come into operation on the first day of January, One thousand eight hundred and sixty-eight, and shall not apply to any purchase concerning which any suit shall be then depending" (s. 3). (See *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 11 Eq. 265; *O'Rorke v. Bolingbroke*, L. R. 2 Ap. Cas. 814.) **170.**

This Act leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. (*Earl of Aylesford v. Morris*, L. R. 8 Ch. Ap. 484, 490.) **171.**

2. Post-obit  
bonds, &c.,  
by expect-  
tants.

2. On similar principles post-obit bonds and other securities of the like nature are set aside, when made by heirs and other expectants. A post-obit bond is an agreement made, on the receipt of the money by the obligor, to pay a sum exceeding the sum so received and the ordinary interest thereof, on the death of the person upon whose decease he expects to become entitled to some property. (St. § 342.) Even the sale of a post-obit bond at a public auction will not give it validity, unless the sale was free, fair,

and with the usual precautions and advertisements. (St. § 347.) If, however, these contracts are perfectly fair in other respects relief will not be granted, except upon the terms of paying that to which the lender is equitably entitled. (St. § 344.) **172.**

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3. Where tradesmen and others have sold goods to young and expectant heirs, at exorbitant prices, and under circumstances indicative of imposition, or of undue influence, or of an intention to connive at profuse expenditure, unknown to their parents or other persons standing *in loco parentis*, Equity has cut down the claim to a just amount. (St. § 348.) **173.**

3. Sales to expectants at exorbitant prices.

4. Common sailors being so extremely generous, credulous, and improvident a class of men that they require guardianship all their lives, Equity treats them in the same light as young expectant heirs; and relief is generally afforded against contracts respecting their prize money or wages, wherever any inequality appears in the bargain, or any undue advantage has been taken. (St. § 332.) **174.**

4. Common sailors.

5. Where a person, shortly after attaining his majority, makes a gift, sale, or lease, in favour of a relative, it will be set aside, unless the grantor or lessor makes it inten-

5. Disposition by a person after majority.

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IV. Virtual  
frauds on  
individuals,  
irrespective  
of any confi-  
dential rela-  
tion, or any  
peculiar  
liability to  
imposition.

1. Mislead-  
ing.

tionally and deliberately, after having had the fullest information on the subject, and separate, independent, and disinterested advice; even though the terms, in the case of a sale or lease, were fair, but yet not so advantageous as might have been obtained. (*Grosvenor v. Sherratt*, 28 Beav. 659.) **175.**

IV. Where something is said or done, or some omission is made, which operates as a virtual fraud upon an individual, but may have been nothing more than mere neglect, unconnected with any selfish or evil design, or may amount, in the opinion of the party, to nothing more than justifiable artifice, or to a fair attempt to obtain a reasonable advantage, or to an allowable act, statement, or omission, of some other kind, relief will be granted on the ground of constructive fraud. **176.** Thus,

1. Where a person, by some act, statement, or omission, whether beneficially to himself or not, knowingly produces a false impression on another, who is misled and injured thereby; and such act, statement, or omission, when rightly considered, is contrary to plain moral duty or good faith, but yet may not have been connected with any design either to injure another or to benefit the person who is guilty thereof, in

such case the latter alone, even though an infant or married woman, shall suffer thereby, on the ground of constructive fraud. (See St. § 384-390; 2 Sp. 575, 576.) For instance, where a person, knowing himself to be the owner of property, permits another to sell it as his own to a third person, who purchases under the supposition that the vendor has a good title, the real owner will not be allowed to assert his title to it. (St. § 385, 389.) And where a person, aware of the existence of an instrument under which he might reasonably have supposed that he took some interest, neglects to make proper inquiries as to the fact, and encourages a stranger to deal with another person respecting property in which he himself is interested under such instrument, he will be bound by the transaction. (See St. § 387.) And where a person becomes a trustee of money for several creditors, and at the date of the trust deed he had a charge on the share of one of them, but it is not mentioned in the deed, he will be postponed to another person who had a subsequent charge on that share, and had no notice of the trustee's charge, but gave him due notice of his own charge. (*Commissioners of Public Works v. Hardy*, 23 Beav.

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508.) And where a person grants a lease on the security of which money is lent, and the lessor, before the lease was granted, was asked by the lender whether he intended to grant such lease, and he answered in the affirmative, forgetting that he had previously granted another lease to the same person, who had assigned it for value, the lessor was held liable for the loss arising from the invalidity of the security. (*Slim v. Croucher*, 1 D. F. & J. 518.) **177.**

"If a man makes a representation, on the faith of which another man alters his own position, enters into a deed, incurs an obligation, the man making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of the payment of an annuity, or to make a provision by will. That in the eye of a Court of Equity is a contract, an engagement which the man making it is bound to perform." (Bacon, V.-C., in *Dashwood v. Jermyn*, L. R. 12 Ch. D. 776.) **177a.**

2. Frauds on  
auctions.

2. Upon sound principle, agreements whereby persons agree not to bid against each other at an auction, especially where the same is directed or required by Law, are held void. For, such agreements may cause the property to be sold at an under-value, and thereby

injure the person interested in the proceeds of sale; and they have a tendency to prejudice the character and value of auctions in general. (See St. § 293; Sugd. V. & P. 13th ed. 93.) But in *Re Carew's Estate*, 26 Beav. 187, and *Galton v. Emuss*, 1 Coll. 243, such agreements were held to be not illegal. (See Dart's V. & P. 4th ed. 99.) On the other hand, if under-bidders or puffers are employed at an auction to enhance the price, and other bidders are thereby misled, the sale will be void (a). (St. § 293.) **178.**

3. As the Statute of Frauds was designed as a protection against fraud, it will never be allowed to be set up as a protection and support of fraud. (*Lincoln v. Wright*, 4 D. & J. 16; *Haigh v. Kaye*, L. R. 7 Ch. Ap. 469; *Booth v. Turle*, L. R. 16 Eq. 182.) And hence, where from any circumstances which may have resulted from fraud, a contract has not been reduced into writing as it ought to have been, it will be enforced against the party who is chargeable with the omission, in case he attempts to shelter himself behind the provisions of the Statute. (See St. § 330.) **179.**

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3. Uncon-  
scientious  
use of the  
Statute of  
Frauds.

(a) See stat. 30 & 31 Vict. c. 48, at the end of the book.



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## 4. Clandestine marriage contracts.

4. If clandestine marriage contracts are designed to impose on parents or persons standing *in loco parentis* or in some other peculiar relation to the parties, so as to disappoint their bounty, or to defeat their intentions in the disposition of their property, such contracts will be set aside, or the equities will be held the same as if they had not been entered into. (See St. § 275.)  
**180.**

## 5. Frauds on marriages.

5. So, relief will be granted to the injured parties, where persons, after doing acts required to be done on a treaty of marriage, render those acts virtually unavailing, by entering into other secret agreements, or derogate from those acts, or otherwise commit a fraud upon a marriage. (See St. § 268-272.) As where a parent declines to consent to a marriage, on account of the intended husband being in debt, and the brother of the latter gives a bond for the debts, to procure such consent; and the intended husband then gives a secret counter-bond to his brother, to indemnify him against the first bond. (St. § 269.) So where a brother, on the marriage of his sister, let her have a sum of money privately, that her fortune might appear to be as much as was insisted on, and the sister

gave a bond to the brother to secure the repayment thereof, the bond was set aside. TIT. I.  
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(St. § 270.) So where, upon a treaty of marriage, a creditor of the intended husband concealed his own debt, and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage, and the creditor was prevented from enforcing his debt. (St. § 271.) And where a father, on the marriage of his daughter, enters into a covenant, that on his death he will leave her a full and equal share of all his personal estate, he cannot afterwards transfer a portion of his personal property to another child, retaining the annual income thereof for his life. (St. § 382.) **181.**

6. Relief will also be granted against acts secretly done by a woman in contravention of the marital rights, or in disappointment of the just expectations of her intended husband. As where a woman, in contemplation of marriage, and without the privity of her intended husband, makes a settlement to her separate use, or a conveyance in favour of persons for whom she is under no moral obligation to provide. But a reasonable provision for her children by a former marriage, under circumstances of good faith, is

6. Frauds on marital rights or expectations.

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free from objection. (St. § 273; 2 Sp. 505; *Countess of Strathmore v. Bowes*, 1 Lead. Cas. Eq. 2nd ed. 325 *et seq.*; *Prideaux v. Lonsdale*, 4 Gif. 159; 1 D. J. & S. 433; *Downes v. Jennings*, 32 Beav. 290.) **182.**

7. Frauds  
under the  
stat. 13 Eliz.  
c. 5 (a).

7. In consequence of the stat. 13 Eliz. c. 5, deeds, though good as between the parties and in other respects, are void as against creditors, when made with an actual intent to defraud them (4 Cruise, T. 32, c. 27, § 4; *Shee v. French*, 3 Drew. 717; *Bessey v. Windham*, 6 Ad. & El. (N. S.) 166), even though such deeds be for valuable consideration (4 Cruise, T. 32, c. 27, § 4; *Strong v. Strong*, 18 Beav. 408; *Bott v. Smith*, 21 Beav. 511; *Ware v. Gardner*, L. R. 7 Eq. 317), except as regards a *bond fide* purchaser from the debtor, or from an assignee of the debtor, without notice of the circumstances amounting to such actual fraud. And if a person makes a conveyance or assignment of any real or personal property which is liable to his debts (unless it is to a purchaser for valuable consideration who has no notice of a fraudulent intent), and at the time, or immediately afterwards, he is indebted to

(a) This subject is more fully discussed in the Author's *Compendium of the Law of Property*, 5th. ed. par. 2375-2390.

such an amount that he has not ample means, besides that property, available to pay the debts, such conveyance or assignment is void as against those who were creditors at the time of and subsequent to the deed, to the extent to which it may be necessary to deal with the property for their satisfaction. (See St. § 352-374, 381; 2 Sp. 887; 4 Cruise, T. 32, c. 27, § 15-17; Coote, Mortg. 3rd ed. 238; 2 Bl. Com. 441; 1 Pres. Shep. T. 66; Ad. Con. 6th ed. 149-156; *Twyne's Case*, 3 Co. 80; Chit. Con. 8th ed. 380 *et seq.*; *Skarf v. Soulby*, 1 Mac. & G. 364; *Re Magawley's Trust*, 5 De G. & S. 1; *Bott v. Smith*, 21 Beav. 511; *Barton v. Vanheythuysen*, 11 Hare, 126; *Denning v. Ware*, 22 Beav. 184; *Holmes v. Penney*, 3 K. & J. 90; *Turnley v. Hooper*, 3 Sm. & G. 349; *Darville v. Terry*, 6 Hurl. & Norm. 807; *Thompson v. Webster*, 4 Drew. 628; 4 D. & J. 600; *Acraman v. Corbett*, 1 Johns. & Hem. 410; *Barling v. Bishopp*, 29 Beav. 417; *Stokoe v. Cowan*, 29 Beav. 637; *Spirett v. Willows*, 3 D. J. & S. 293; *Smith v. Cherrill*, L. R. 4 Eq. 390; *Reese River Silver Mining Company v. Atwell*, L. R. 7 Eq. 347; *Freeman v. Pope*, L. R. 9 Eq. 206; 5 Ch. Ap. 538; *Allen v. Bonnett*, L. R. 5 Ch. Ap. 577; *Cornish v. Clark*, L. R. 14 Eq. 184; *Kent v. Riley*,

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L. R. 14 Eq. 190 ; *Taylor v. Coenen*, L. R. 1 Ch. D. 636.) A deed, however, which is apparently voluntary, may be shown by extrinsic evidence to have been made for valuable consideration, and may be supported as such against creditors. (*Pott v. Todhunter*, 2 Coll. 76.) And a deed is not necessarily void under this Act, merely because designed to prefer or defeat a particular creditor. (Ad. Con. 6th ed. 151 ; Chit. Con. 8th ed. 383 ; *Alton v. Harrison*, L. R. 4 Ch. Ap. 622.) **183.**

A man who contemplates going into trade cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in the trading operations. So that a voluntary settlement, whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement. (*Mackay v. Douglas*, L. R. 14 Eq. 106.) **184.**

8. Frauds on  
creditors.

8. If a creditor, who is a party to a composition deed, has, unknown to the other creditors, obtained any benefit or security, either from the debtor or a third person, beyond what the others have received, or

enters into a contract with the debtor which prevents him from being put into that situation of freedom from existing demands which may be considered as one of the chief inducements to the others to sign the deed, it is a fraud on the policy of the Law; and such secret arrangements are entirely void, even as against the assenting debtor, or his sureties, or his friends; and money paid under them may be recovered back. (See St. § 378, 379; 2 Sp. 357–360.) **185.**

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So an agreement between an insolvent debtor and his assignee, by which the estate of the insolvent is to be held in trust, to pay certain annuities to the insolvent, and to apply the surplus to the extinction of a debt to the assignee, will be rescinded, even at the instance of the insolvent himself. (St. § 380.) And it was held to be a fraud for a creditor secretly to obtain a larger dividend than was received by the other creditors, under the arrangement clause in the Bankrupt Act of 1849 (s. 230); and relief was granted even at the instance of the debtor. (*Mare v. Sandford*, 1 Gif. 288.) **186.**

9. Where a person takes a mortgage, or a conveyance, or a settlement, with notice of the legal or equitable title of other persons to the same property, his own title will be

9. Mortgage, conveyance, or settlement, with notice of another's title.

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postponed and made subservient to their title, or to that of a transferee from them (St. § 395, 396 ; Sugd. Concise View, 595-7 ; *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 2nd ed. 23 *et seq.* ; *Atterbury v. Wallis*, 8 D. M. & G. 454 ; *Pease v. Jackson*, L. R. 3 Ch. Ap. 576 ; *Barnes v. Wood*, L. R. 8 Eq. 424 ; *Maxfield v. Burton*, L. R. 17 Eq. 15) ; except in cases within the stat. 27 Eliz. c. 4. (See par. 193-9, *infra*.) Thus, if a person takes a mortgage of property, knowing that it was subject to an equitable mortgage made by deposit of the title-deeds, the notice of the equitable mortgage will raise a trust in him to the amount of the equitable mortgage. (St. § 395.) And, on the same principle, if a mortgagee, when he takes his security from a partner, knows that the firm are in possession of the property, he has constructive notice of the title of the partnership ; and his claim must be postponed to that of the other partner, as regards his share, and his right to be recouped in respect of partnership debts paid off by him, whether contracted before or after the mortgage. (*Cavander v. Bulteel*, L. R. 9 Ch. Ap. 79.) **187.**

Notice is attended with the same consequence even where the property lies in a register county. For, the object of the

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Registration Acts being only to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances, if a subsequent purchaser or mortgagee has notice, at the time of his purchase or mortgage, of any prior unregistered conveyance or mortgage, he will not be permitted to avail himself of his title against the prior conveyance or mortgage, any more than he would if the same were registered. (St. § 397; 2 Sp. 763.) **188.**

Notice may be either actual or constructive, *i. e.* imputed by construction of Law. (2 Sp. 754.) Actual notice, to constitute a binding notice, at least where it depends on oral communication only, must be given by a person interested in the property, and in the course of the treaty. (2 Sp. 753.) **189.**

As regards constructive notice, whatever is sufficient, or whatever for the purposes of justice is to be deemed sufficient, to put any person of ordinary prudence on inquiry, is constructive notice of everything to which that inquiry might have led. (2 Sp. 755–760; *Ogilvie v. Jeaffreson*, 2 Gif. 353, 378; *Leigh v. Lloyd*, 2 D. J. & S. 330; *Broadbent v. Barlow*, 3 D. F. & J. 570; *Pilcher v. Rawlins*, L. R. 11 Eq. 53; 7 Ch. Ap. 259; *Maxfield v. Burton*, L. R. 17 Eq. 15;



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*Cavander v. Bulteel*, L. R. 9 Ch. Ap. 79.)

And hence a purchaser who has notice of a tenancy is deemed to have notice of a lease, if any, and therefore is not entitled to any compensation on account of it. (*James v. Lichfield*, L. R. 9 Eq. 51.) And, as a general rule, a purchaser or other person has constructive notice of the contents of the instrument under which he claims, or under which the party with whom he contracts, as executor or trustee or appointee, derives his power. Under ordinary circumstances, a man cannot claim under a deed or will, and yet repudiate a knowledge of its contents. (St. § 400; *Pilcher v. Rawlins*, L. R. 11 Eq. 53; 7 Ch. Ap. 259.) But the mere registration of a conveyance is not deemed constructive notice to subsequent purchasers, as to collateral effects; so that the mere registration of a second mortgage will not prevent a prior mortgagee from tacking a third mortgage, when he had no actual notice of the existence of the second mortgage. (St. § 401, 402; 2 Sp. 763.) To constitute constructive notice, it is sufficient if it is brought home to the agent, solicitor, or counsel, in the same transaction, or in one immediately preceding; unless there is a moral certainty that he would not have communicated the

fact to the principal or client (St. § 408 ; 2 <sup>TIT. I.</sup> Sp. 700, 761 ; *Spaight v. Cowne*, 1 Hem. & <sub>CAP. IV.</sub> Mil. 359 ; *Atterbury v. Wallis*, 8 D. M. & G. 454 ; *Thompson v. Curtwright*, 33 Beav. 178, 185 ; *Rolland v. Hart*, L. R. 6 Ch. Ap. 678 ; *Maxfield v. Burton*, L. R. 17 Eq. 15), or he, colluding with the person who was bound to give the notice, concealed the fact (*Sharpe v. Foy*, L. R. 4 Ch. Ap. 35). And where the mortgagor has at different times employed the same solicitor in effecting different incumbrances upon the same estate, and the incumbrancers have employed the mortgagor's solicitor in the several transactions, each of the *puisne* incumbrancers is affected with notice of the prior incumbrances. (2 Sp. 761 ; Fisher, Mortg. 2nd ed. par. 1107.) But the circumstance of only one solicitor acting in a transaction does not necessarily constitute him the solicitor of both parties, so as to affect both parties with notice of the facts. (*Perry v. Holl*, 2 D. F. & J. 38.) **190.**

A purchaser of a legal estate, with notice of an equitable claim, will be protected if he purchases from a prior *bond fide* purchaser without notice ; for otherwise the latter would not enjoy the full benefit of his own unexceptionable title. And if a purchaser

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who had notice sells to another, and the latter had no notice and is a *bond fide* purchaser for a valuable consideration, the title will not be affected with notice in his hands; for otherwise no man would be safe in any purchase. (St. § 409, 410; 2 Sp. 754; Sugd. V. & P. 14th ed. 153; 2 Lead. Cas. Eq. 2nd ed. 36, 37 *et seq.*) **191.**

10. Fraudulent dealing with executors or administrators.

10. Purchases from executors of the personal property of their testator are ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity in the hands of the executor; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator, to which they are legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside. (St. § 422, 423, 580, 581; *Elliot v. Merryman*, 1 Lead. Cas. Eq. 2nd ed. 45 *et seq.*) **192.**

11. Frauds under the stat. 27 Eliz. c. 4, in the case of voluntary deeds, as against subsequent purchasers or mortgagees.

11. The object of the statute 27 Eliz. c. 4, being to give full protection to subsequent purchasers against voluntary prior conveyances, a prior conveyance is deemed void, as against a subsequent purchaser or mortgagee, whether with or without notice, and even

after proceedings to enforce such prior conveyance, if not on valuable consideration, although it may be *bond fide* and on good consideration, or although it may be expressed to be made for divers valuable considerations, not naming them; on the ground that the Statute, in every such case, infers fraud, and will not suffer the presumption to be rebutted. As between the parties themselves, however, such conveyances are binding. And where a voluntary settlement has been made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it which the settlor would not have possessed. And as between two voluntary conveyances, if the first is fraudulent, the second will prevail; but where each is *bond fide*, Equity will not interfere. (St. § 425, 426, 433; 2 Sp. 288, 638; *Ellison v. Ellison*, 1 Lead. Cas. Eq. 2nd. ed. 199 *et seq.*; *Kelson v. Kelson*, 10 Hare, 386; *Barton v. Vanheythuysen*, 11 Hare, 126; *Lewis v. Rees*, 3 K. & J. 132, 150, 151; *Daking v. Whimper*, 26 Beav. 568; *Lloyd v. Attwood*, 3 D. & J. 614; *Dolphin v. Aylward*, L. R. 4 H. L. 486; *Rosher v. Williams*, L. R. 20 Eq. 210.) Nor will Equity interfere where the voluntary grantee has conveyed to a *bond fide* pur-

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chaser for valuable consideration, before the *bond fide* purchaser from the voluntary grantor acquired his title. (St. § 434.) And Equity will not give its aid to a voluntary settlor to enable him to complete a contract for sale against a purchaser. (2 Sp. 289.) **193.**

The law that a man who has executed a voluntary settlement is enabled to sell the estate just as if he had done nothing, is highly unreasonable. And the Courts will now lay hold of any circumstances constituting a consideration moving from the grantee to the grantor to take a case out of the category of voluntary deeds. (V.-C. Malins, in *Rosher v. Williams*, L. R. 20 Eq. 218.) **194.**

There is this exception to the general rule, in the case of a charity, that if a purchaser has notice of a gift to a charitable use, or purchases without notice of it from a purchaser who had notice of it, he takes subject to it; though, if he has no notice, and he has not purchased from a purchaser with notice, he will have the same protection as he would have against an ordinary voluntary conveyance. (2 Sp. 289; Tudor's Char. Trusts, 2nd ed. 329-332.) **195.**

A fair voluntary settlement in favour of

a wife and children is also an exception to the rule to this extent, that almost any *bond fide* consideration, in addition to the meritorious consideration of the provision itself, will be sufficient for the purpose of supporting the settlement, whether it appear on the face of the settlement or be otherwise made out. Therefore, if a person whose concurrence the parties deem essential joins in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with anything. (See 2 Sp. 288, 290; Sug. Concise View, 568, 569; *Atkinson v. Smith*, 3 D. & J. 186; *Bayspoole v. Collins*, L. R. 6 Ch. Ap. 228.) **196.**

As to pre-nuptial settlements and post-nuptial settlements in pursuance of pre-nuptial articles, or on receipt of an additional portion, or on which the husband and wife, having interests, give up something, they are settlements for valuable consideration, and of course good against subsequent purchasers, or against prior voluntary grantees, as the case may be. (Smith's Compendium, 5th ed. par. 2395; *In re Foster and Lister*, L. R. 6 Ch. D. 87.) **197.**

A collateral relation, who is the object of an ulterior limitation in a settlement, is not

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a mere volunteer: for though he may not be within the consideration of the marriage, he is within the contract; but yet it has been held that he cannot prevail against a purchaser. (2 Sp. 291-3.) **198.**

A conveyance for payment of debts generally, to which no creditor is a party, and in which no particular debt is expressed, is a fraudulent conveyance within the statute. (2 Sp. 351.) **199.**

2. Frauds  
in the case  
of voluntary  
gifts, as  
against the  
donors  
themselves.

12. In every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary, if the transaction be called in question, that he should be able to establish that the person giving him the benefit did so voluntarily and deliberately, and with full knowledge of what he was doing: if this is not established, the transaction will be set aside. (*Huguenin v. Baseley*, 2 Lead. Cas. Eq. 2nd ed. 462 *et seq.*; *Cooke v. Lamotte*, 15 Beav. 241; *Anderson v. Elsworth*, 3 Gif. 154; *Sharp v. Leach*, 31 Beav. 491; *Toker v. Toker*, 31 Beav. 629; *Phillipson v. Kerry*, 32 Beav. 628; *Lyon v. Home*, L. R. 6 Eq. 655.) And where the circumstances are such that the donor ought to be advised to reserve a power of revocation, it is the duty of the solicitor to the donor, or a solicitor acting for both

Want of a  
power of  
revocation.

parties, so to advise; and in such a case, TIT. I.  
CAP. IV. the want of such a power will in general, in the absence of such advice, be fatal to the deed. (*Coutts v. Acworth*, L. R. 8 Eq. 558, 567; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Phillips v. Mullings*, L. R. 7 Ch. Ap. 244, 247, 248; *Hall v. Hall*, L. R. 14 Eq. 365.) It is not necessary to show that the usual clauses were explained; but any unusual clauses must be shown to have been brought to the donor's notice, explained, and understood. (*Phillips v. Mullings*, L. R. 7 Ch. Ap. 244, 248.) **200.**

13. The donee of a power must exercise it *bonâ fide* for the end designed: otherwise it is considered as a fraud upon the power. (*Topham v. Duke of Portland*, 1 D. J. & S. 517.) Hence, where a person has a power of appointing to all or any of his children, and he exercises it in favour of one child, merely in order to remove an objection to the title of an estate, the appointment is void. And if a person, having a particular power to be exercised for the benefit of others, makes an appointment in payment of a debt due to the appointee by the appointor, or upon the terms or for the purpose of securing some benefit to himself or some others not objects of the power, such

13. Fraudulent appointments.

Appointment must be made for the end designed.

Appointment whereby a benefit is secured to the appointor or a stranger.



TIT. I.  
CAP. IV.

an appointment is fraudulent, and will be set aside in Equity: as where the donee of a power appoints a fund to one of the objects of the power, under an understanding that the latter is to lend the fund to the former, though on good security; or that the appointee should hold the fund in trust for, or make over a part to, persons some of whom are not objects of the power. **201.**

Appoint-  
ment to an  
infant.

Upon the same principle, if a parent appoints an immediate portion to an infant who is not in want of it, or appoints to a child, whether infant or adult, who is seriously ill, with a view to becoming entitled to that which is so appointed himself, as the personal representative of such appointee in the event of his death, the appointment is void as a fraud upon the power. **202.**

Rights of  
creditors  
against a  
general  
appointee.

Where a person exercises a general power of appointment in favour of a stranger, it will be deemed a fraud upon his creditors, who will in Equity become entitled to the money in the hands of the appointee. (Smith's Compendium of the Law of Property, 5th ed. par. 2136-8; *Alcyn v. Belchier*, 1 Lead. Cas. Eq. 2nd ed. 304 *et seq.*; *Re Marsden's Trust*, 4 Drew. 594.) **203.**

14. Putting  
an end to  
that which  
formed the

14. If a man has induced another to enter into a contract with him, by representing an

actual state of things as a security for the enjoyment of an interest which he has himself created for valuable consideration, he is not at liberty, by his own act, to derogate from that interest, by determining the state of things which he has so held forth as the consideration for entering into the contract. (*Piggott v. Stratton*, Johns. 341 ; 1 D. F. & J. 33.) **204.**

TIT. I.  
CAP. IV.

consideration for a contract.

15. A person who has entered into a purchase contract cannot rescind such contract, in order to turn to his own benefit a flaw in the vendor's title, which he has discovered from the abstract ; as by buying up the interest of an heir-at-law whose concurrence is necessary. (*Murrell v. Goodyear*, 2 Gif. 51 ; 1 D. F. & J. 432.) **205.**

15. Rescinding contract in order to benefit by a flaw in the title.



## TITLE II.

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### Of Executibe Equity.

## CHAPTER I.

## OF LEGACIES AND PORTIONS.

TIT. II.  
CAP. I.

Juris-  
diction.

No action lies, at the Common Law, to recover legacies, unless the executor has assented to them (St. § 591); because all the chattels vest in him, and are liable to the payment of the testator's debts, and it is the duty of the executor, before he pays, delivers over, or assents to the legacies, to see whether there will be sufficient left to pay the debts, inasmuch as a man must be just before he is permitted to be generous. (See 2 Bl. Com. 512.) But after the executor has assented to a specific legacy of chattels, the property vests immediately in the legatee, who may maintain an action at Law for the recovery thereof. A similar rule was attempted to be applied at Law to pecuniary legacies, but the application was doubted and disapproved of (St. § 591); because Courts of Law could not impose on the parties recovering these legacies such terms as might be required; so that, for example,

TIT. II.  
CAP. I.  
--- --

a husband might recover a legacy given to his wife, without making any provision for her or her family. (St. § 592.) And where there is an actual trust, express, implied, or constructive, or the legacy is charged on land, or the other Courts cannot take due care of the interests of all parties, Courts of Equity will assert an exclusive jurisdiction. And even where the executor has assented to the legacy, and there is no actual trust, yet they have jurisdiction, though it may be merely a concurrent jurisdiction; because the executor is considered as a kind of trustee for the legatees, which forms a universal ground of equitable interference; and because the interposition of a Court of Equity may be required to obtain an account or distribution of assets, or some other relief or assistance which the other Courts are or were incompetent to afford. (See St. § 593-602.) **206.**

By the stat. 20 & 21 Vict. c. 77, s. 23, no suit for legacies or the distribution of residues might be entertained by the Court of Probate, or by any Court or person whose jurisdiction as to matters and causes testamentary was thereby abolished. But by the stat. 9 & 10 Vict. c. 95, s. 65, and 13 & 14 Vict. c. 61, s. 1, a legacy not involving a

**TIT. II.** trust, and not exceeding £50, might be re-  
**CAP. I.** covered in a County Court. **207.**

Legacy pay-  
 able at a  
 future day.

In cases of legacies payable at a future day, whether contingent or otherwise, Courts of Equity will compel the executor to give security for the payment thereof; or, which is the modern and perhaps the more appropriate practice, it will order the fund to be paid into Court, even if there is not any actual waste or danger of waste. (St. § 603.) **208.**

Specific  
 legacy to  
 one for life,  
 remainder  
 to another.

And where a specific legacy is given to one for life, and after his death to another, there the legatee in remainder can obtain a decree for security from the tenant for life, for the due delivery over of the legacy to the remainder-man, if there is some allegation and proof of waste, or of danger of waste. But, in the present day, if there is no such allegation and proof, the remainder-man is only entitled to have an inventory of the property which was bequeathed to him, so that he may be enabled to identify it, and to enforce a due delivery of it, when his right of present possession accrues. (St. § 604.) **209.**

What  
 children to  
 be included.

Generally speaking, when a future period of distribution among children is contemplated by the will or other instrument, all

who are born during the life of the parent, or before the period of distribution, are entitled to a share. (2 Sp. 418. See *Viner v. Francis*, Tud. Lead. Cas. Real Prop. 2nd ed. 702.) **210.**

TIT. II.  
CAP. I.

If a legacy is given for a particular purpose, the fact that it cannot be effected will not prevent the legacy from vesting in the donee. (2 Sp. 466, note (c).) So that if a bequest be to or in trust for a legatee, to apprentice him, or the like, it is an absolute gift to the legatee; and if he dies before it is so applied, it will belong to his representatives. (2 Sp. 462.) **211.**

Legacy for  
a purpose  
which can-  
not be ac-  
complished.

A legacy by a parent to a child is presumed to be a portion, although it be not so expressed; because it is the duty of a parent to provide for his child. The duty which is imposed upon the parent may be assumed by any other person who for any reason thinks proper to put himself in that respect in the place of the parent; and when it is so assumed, the same presumption will arise as in the case of a legacy or gift by a parent. There are many doctrines which are applicable to portions, that is, sums of money secured or given by a parent or person standing *in loco parentis* to a child, which would not be applied to a gift as between strangers. (2 Sp. 394.) **212.**

What is a  
portion.



TIT. II.  
CAP. I.

Where portions or legacies are not to be raised.

If portions or legacies charged on land are made payable on an event personal to the party to be benefited, and he dies before that event happen, the portion or legacy is not to be raised out of the land. But it is otherwise if the payment is postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid. (2 Sp. 396.) **213.**

Where a portion is secured, and no particular time is fixed for the vesting, if the child dies before the time when the portion is needed, the portion will not be raised: for it is reasonable that the land should be eased of the charge, when the only motive for making the same is at an end. (2 Sp. 398.) **214.**

Time for raising portions.

If there is a limitation to the parent for life, with a term to raise portions at twenty-one or marriage, and the interests are vested, the portions must be raised forthwith by sale or mortgage of the reversionary term, unless there is something to indicate an intention that the portions shall not be raised until the term falls into possession. (2 Sp. 405.) **215.**

When a legacy is given by a father or a

person standing *in loco parentis*, as a provision for an infant, and no maintenance or interest is given, though the legacy be payable at a future day, the infant has an immediate right to interest. (2 Sp. 409; 2 Rop. Leg. 4th ed. 1257, 1270, 1348.) **215a.**

TIT. II.  
CAP. I.

When real estate is so settled as that it must on the death of a parent go to his eldest son, and provision is made, not by a stranger or relation not standing *in loco parentis*, but by that parent or by a person standing *in loco parentis*, whether by pre-nuptial settlement or by will, for the younger children of such parent or person, the Court has considered the presumption, that it was intended to make provision for all the children, and not to give a double portion to any, to be so strong, that it has let in all children unprovided for by the settlement or will itself, or by means which were in contemplation of the parties making the settlement or will, though not strictly "younger," and has excluded the child provided for by the family estate, even though a younger child. This latitude of construction is not extended to a legal limitation in a deed. In ordinary cases, the period of distribution, and not the period of vesting, is the time for ascertaining who is to be excluded. (2 Sp.

Construction of provisions for "younger children."

**TIT. II.** 411-416; *In re Bailey's Settlement*, L. R.  
**CAP. I.** 9 Eq. 491.) **216.**

Construc-  
tion of  
legacies.

In deciding on the validity and interpretation of purely personal legacies, Courts of Equity in general follow the rules of the Civil Law, as they were recognised and acted on in the Ecclesiastical Courts; but as to the validity and interpretation of legacies charged on land, they generally follow the rules of the Common Law. (St. § 602, 608.) **217.**

With these few remarks we must dismiss the subject of Legacies and Portions, as a separate topic, since it is so extensive that the doctrines of Equity respecting it could not be even succinctly stated, without far transgressing the limits allotted to the present Manual. **218.**

## CHAPTER II.

## OF DONATIONES MORTIS CAUSA.

COURTS of Equity maintain a concurrent jurisdiction in all cases of this kind, where the assistance afforded at Law was not adequate or complete. (St. § 606; *Ward v. Turner*, 1 Lead. Cas. Eq. 2nd ed. 721 *et seq.*)

TIT. II.  
CAP. II.

Juris-  
diction.

**219.**

A *donatio mortis causa* is a gift of personal property made by one who apprehends that he is in peril of death, and evidenced by a manual delivery by him, or by another person in his presence by his direction, to the donee or some one else for the donee, of the property itself, or of the means of obtaining possession of the same, or of the writings by which the ownership thereof was created, and conditioned to take effect absolutely in the event of his not recovering from his existing disorder, and not revoking the gift before his death. (St. § 606, 607a-607c; 1 Sp. 196; 2 Sp. 912; *Powell v. Hellicar*, 26 Beav. 261.) Thus, negotiable notes, promissory notes, payable

Definition.

TIT. II.  
CAP. II.

What may  
be the sub-  
ject of such  
donations.

to order, though not indorsed, bills of exchange, though not indorsed, bank notes, bankers' deposit notes, cheques drawn by a third person, policies of insurance, bonds, and mortgages, may be the subject of such donations; and goods in a warehouse may be given in like manner by a delivery of the key. (St. § 607a; 1 Sp. 196; 2 Sp. 657; *Bouts v. Ellis*, 17 Beav. 121; *Veal v. Veal*, 27 Beav. 303; *Rankin v. Weguelin*, 27 Beav. 309; *Witt v. Amis*, 1 Best & Sm. 109; *Amis v. Witt*, 33 Beav. 619; *Moore v. Moore*, L. R. 18 Eq. 474.) But the delivery of the donor's cheque, which was not presented before his death, was held not to be a good *donatio mortis causâ* (*Hewitt v. Kaye*, L. R. 6 Eq. 198; *Bromley v. Brunton*, L. R. 6 Eq. 275; *In re Beak's Estate*, *Beak v. Beak*, L. R. 13 Eq. 489), unless paid away for valuable consideration before his death (*Rolls v. Pearce*, L. R. 5 Ch. D. 730). And railway stock cannot be the subject of a *donatio mortis causâ*. (*Moore v. Moore*, L. R. 18 Eq. 474.) **220.**

Mixed  
character  
of such  
donations.

A donation of this kind partakes partly of the characteristics of a gift *inter vivos*, and partly of those of a legacy. It differs from a legacy in these respects: 1. It takes effect *sub modo* from the delivery in the lifetime of

the donor; and therefore it cannot be proved as a testamentary act in the Court of Probate. 2. It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. It differs from a gift *inter vivos* in certain respects in which it resembles a legacy: 1. It is revocable during the donor's lifetime. 2. It may be made to the wife of the donor. 3 It is liable to the debts of the donor on a deficiency of assets. (St. § 606 a; 1 Sp. 196.)

**221.**

Words of absolute gift, if accompanied by expressions showing that the intention was that the property should be enjoyed only in the event of the death of the donor, will be sufficient to constitute a *donatio mortis causâ*. (2 Sp. 912.) **222.**

Evidence of the clearest and most unequivocal character is requisite to support a *donatio mortis causâ*. (*Cosnahan v. Grice*, 15 Moo. P. C. 215.) **223.**

TIT. II.  
CAP. II.

By what  
words  
created.

Evidence.

## CHAPTER III.

### OF EXPRESS PRIVATE TRUSTS EVIDENCED BY SOME WRITTEN DOCUMENT.

**TIT. II.**  
**CAP. III.**

**I. Definition  
of a trust.**

I. A TRUST, when used in the sense of an equitable interest, is not now, as it was at one time, considered a chose in action; it is a beneficial interest in, or a beneficial ownership of, real or personal property, unattended with the possessory and legal ownership thereof. (See Smith's Executory Interests, annexed to Fearn, § 40-6, 50; 2 Sp. 875.)

**224.**

**II. Extent  
of jurisdiction  
over  
trusts.**

II. Trusts arising under wills are exclusively within the jurisdiction of Courts of Equity. (St. § 1058.) And indeed this is the case with most matters of trust. (St. § 962.)

**225.**

**III. Division  
of trusts.**

III. Trusts may be divided into three kinds: express trusts, implied trusts, and constructive trusts. The last two, however, are frequently confounded, or at least classed together, and are sometimes designated by

the name of implied trusts, and sometimes by the name of constructive trusts. **226.**

TIT. II.  
CAP. III.

IV. An express trust is a trust which is clearly expressed by the author thereof, or may fairly be collected from a written document. **227.**

IV. Definition of an express trust.

V. The Statute of Frauds requires all declarations of trust, of freehold, copyhold, or leasehold lands, tenements, or hereditaments, to be evidenced by some writing signed by the party declaring the same. But declarations of trust of money, even though secured on real estate, or of chattels personal, need not be so evidenced. (St. § 972; 1 Sp. 497, 498; 2 Sp. 19, 20, 897; *Peckham v. Taylor*, 31 Beav. 250.) **228.**

V. Mode of declaration of trust.

A declaration of trust, if *bond fide*, is valid, though at a distance of time. And if the document refers to any other document, which shows what was meant by the parties, that is sufficient. (2 Sp. 21, 22.) And if the terms of the trust do not sufficiently appear upon the face of the instrument, evidence may be received to show the position of the party signing, and the circumstances by which he knew himself to be surrounded, and the credibility of the instrument. (2 Sp. 22.) **229.**

It is not necessary that there should be



TIT. II.  
CAP. III.

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any actual transfer of property to render a declaration of trust effectual. If a person declares himself to be a trustee for another of money or personal property to be recovered, whether in writing or by acts or declarations of a decisive and definite nature sufficiently proved, the transaction will be binding against him and his representatives. (2 Sp. 897; *Dipple v. Corles*, 11 Hare, 183; *Peckham v. Taylor*, 31 Beav. 250; *Grant v. Grant*, 34 Beav. 623.) And if a person, by writing or by word, directs his debtor to hold the money due in trust for a third person, and such direction is communicated to the debtor and the donee, an effectual trust is created in favour of the donee. (2 Sp. 53, 898; *Paterson v. Murphy*, 11 Hare, 88; *Vanderberg v. Palmer*, 4 K. & J. 204.) And if a person signs and hands over a memorandum of gift of a bond, without handing over the bond, that has been held to be a good declaration of trust. (*Morgan v. Malleon*, L. R. 10 Eq. 475.) But a mere promise to give, without valuable consideration, or a defective conveyance, gift, or assignment, without valuable consideration, where the party means actually to vest the *legal* ownership in the donee, or in any other person as trustee for him,

will not be considered as a declaration of trust. (2 Sp. 57, 887; *Dipple v. Corles*, 11 Hare, 183; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Moore v. Moore*, L. R. 18 Eq. 474.) In order to give validity to a declaration of trust, it is necessary that the person declaring the trust should have parted with his interest in the property, and put it out of his power, at least in intention. So that a delivery of a box not containing a deed of gift, and of the key of which the party delivering it retains possession, will not amount to a declaration of trust of the contents. (*Warriner v. Rogers*, L. R. 16 Eq. 340.) And it has been held that a memorandum expressive of "an intention to leave" or a "determination to appropriate" a fund to a person, and a declaration, during a last illness, of a wish that it should be given to such person, does not amount to a declaration of trust, but is a mere inoperative indication of a testamentary intent not carried into effect. (*Re Glover*, 2 Johns. & H. 186.) **230.**

VI. Where uses are expressly and clearly limited, which the Statute of Uses will not execute, that is, convert into legal estates, trusts are thereby created; for modern uses, unexecuted by the Statute, are trusts, just as

TIT. II.  
CAP. III.

VI. By what words a trust may be created.

TIT. II. all uses were trusts before the Statute was  
CAP. III. made. And where uses are engrafted on  
uses, the Statute only executes the first use ;  
so that where an estate is limited to A. and  
his heirs, to the use of B. and his heirs, to  
the use of or in trust for C. and his heirs, the  
Statute executes the use to B. and his heirs ;  
but the use to C. and his heirs is not executed  
by the Statute, but is a trust. Nor does the  
Statute execute uses or trusts where it is  
requisite that the trustee should continue to  
hold the estate in order to perform them.  
Nor does the Statute extend to uses or trusts  
of chattels real or personal ; the words of  
the Statute being, "when any person is  
*seised* to the use," &c., and the word "*seised*"  
being inapplicable to personal estate. And  
trusts of copyholds were excluded from the  
operation of the Statute, because other-  
wise the rights of Lords would have been  
infringed. (See St. § 970 ; 1 Sp. 466, 490 ;  
*Tyrrell's Case*, Tud. Lead. Cas. Real Prop.  
2nd ed. 274.) **231.**

No particular form of expression is neces-  
sary to the creation of a trust. (1 Sp. 498 ;  
2 Sp. 20.) And a trust may be created,  
although there may be an absence of any  
expressions which in terms import con-  
fidence. (*Page v. Cox*, 10 Hare, 169.) **232.**

There are many cases, arising under wills, in which it is very difficult to determine whether or not a trust was intended to be created. It may, however, be laid down as a general rule, that expressions of recommendation, confidence, hope, wish, and desire are considered to create trusts, if the object and the property which is to form the subject of the supposed trusts are certain and definite, and if, regard being had to the whole context and circumstances of the will, the subject-matter, the previous conduct of the testator, the situation of the parties, and the probable intent, the expressions appear to have been intended to be imperative: and expressions showing a desire that an object should be accomplished will be deemed imperative, unless there are plain express words, or there is a necessary implication that the testator did not mean to exclude a discretion to accomplish the object or not, as the party may think fit. But if either the object or the subject is not definite; or if a discretion and a choice to act or not is given; or if the prior disposition of the property imports an absolute ownership, as where it is given without any fetter in a former part of the will; or if the motive assigned is beneficial to the donee; or if the words which contem-

TIT. II.  
CAP. III.

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plate a benefit to a third person appear to be expressive of the motive by which the testator was actuated, rather than of a trust in favour of such person ; as where a legacy is given to A. the better to enable him to maintain his children ; or where a testator bequeaths a sum to trustees upon trust to pay the income to a person for life, “nevertheless to be by him applied towards the maintenance, education, or benefit of his children,” which are legal obligations in the case of a father, though only moral obligations in the case of a mother ; no valid trust will be created by words of this character. (St. § 1069, 1070, and notes ; 2 Sp. 64–71 ; *Harding v. Glyn*, 2 Lead. Cas. Eq. 2nd ed. 789 *et seq.* ; *Briggs v. Penny*, 3 Mac. & G. 546 ; 2 Rop. Leg. 1446 ; *Thorp v. Owen*, 2 Hare, 607 ; *Macnab v. Whitbread*, 17 Beav. 299 ; *Reeves v. Baker*, 18 Beav. 372 ; *Castle v. Castle*, 1 D. & J. 352 ; *Gulley v. Cregoe*, 24 Beav. 185 ; *Byne v. Blackburn*, 26 Beav. 41 ; *Wheeler v. Smith*, 1 Gif. 300 ; *Quayle v. Davidson*, 12 Moo. P. C. 268 ; *Fox v. Fox*, 27 Beav. 301 ; *Bonser v. Kinnear*, 2 Gif. 195 ; *Shovelton v. Shovelton*, 32 Beav. 145 ; *Bibby v. Thompson* (No. 1), 32 Beav. 646 ; *Hart v. Tribe* (No. 4), 32 Beav. 279 ; 1 D. J. & S. 418 ; *Hood v. Oglander*, 34 Beav. 513 ;

*Barre v. Fewkes*, 2 Hem. & Mil. 60; *Eaton v. Watts*, L. R. 4 Eq. 151; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Lambe v. Eames*, L. R. 10 Eq. 267; *Mackett v. Mackett*, L. R. 14 Eq. 49; *Curnick v. Tucker*, L. R. 17 Eq. 320; *Le Marchant v. Le Marchant*, 18 Eq. 414; *Stead v. Mellor*, L. R. 5 Ch. D. 225.) And any words by which it may be expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain. And a vague description of the object, that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the object from being certain within the meaning of the rule. (St. § 1070, note; 2 Sp. 69, 72, 78; *Green v. Marsden*, 1 Drew. 646; *Breton v. Mockett*, L. R. 9 Ch. D. 95; *Parnall v. Parnall*, L. R. 9 Ch. D. 96.) But where in terms or in effect a gift is made to a parent for or towards the support of himself and children, the mere fact that the parent may apply part of the property for his own support, does not render the subject uncertain, so as to prevent the disposition

TIT. II.  
CAP. III.

TIT. II.  
CAP. III.

from being construed to create a trust in favour of his children. It is only an uncertainty which the Court can remove by ascertaining, if necessary, what should be devoted to the children. (2 Sp. 463-5.) Again, the family of A. will often be a sufficient designation of the objects; for the context may render it definite, and show that it means the heir-at-law of A., or, in other cases, the children of A., or, in others, the brothers and sisters or next of kin of A., according to the Statutes of Distribution. Generally speaking, neither the husband nor the wife will be considered as included under the word "family." Although the term "relations" is still more indefinite, the Court has executed a trust in favour of relations, by giving the property, when personal, to the next of kin, according to the Statutes of Distribution, but *per capita*. (St. § 1071; 2 Sp. 73-6.) But where a testator devised his leasehold estates to his brother A. for ever, "hoping he would continue them in the family," this did not create a trust; for the words gave a choice, and the object was not definite. (St. § 1072; 2 Sp. 75.) And where a testator bequeathed to his wife all the residue of his personal estate, "not doubting but that she will dispose of what

shall be left at her death to his two grand-children ;" these words did not create a trust, because the property would be uncertain for it might be just what she chose to leave. (St. § 1073.) **233.**

TIT. II.  
CAP. III.

VII. A valid trust may be created by words expressive of confidence that a devisee or legatee will carry out the testator's wishes, verbally communicated to him before the will was made. (*Irvine v. Sullivan*, L. R. 8 Eq. 673.) And if a devisee or legatee expressly or impliedly promises a testator that he will give effect to the testator's wishes for the benefit of some other person, or for some object, even though they be only verbally expressed after the will was executed, the devise or bequest is subject to a trust to carry out those wishes, where they are such as, if expressed in the will, would be enforced. (*McCormick v. Grogan*, L. R. 4 H. L. 82; *Norris v. Frazer*, L. R. 15 Eq. 318.) **234.**

VII. How a  
devise or  
bequest may  
be verbally  
impressed  
with a trust.

It sometimes happens that although no valid trust is created, yet it is clear that a trust was intended; and in such instances the person to whom the gift is made is as completely excluded from taking beneficially as if a valid trust were created. This is the case where the words are directly or indirectly

Donee  
excluded  
from takin  
beneficially,  
if trust was  
intended,  
though not  
valid.

H



**TIT. II.** imperative, but the objects are too indefinite,  
**CAP. III.** or are not pointed out at all, or not in such  
 a way that the Court can take judicial notice  
 of them. (St. § 979 a, b; *Briggs v. Penny*,  
 3 Mac. & G. 546; *Bernard v. Minshull*,  
 Johns. 276.) **235.**

**VIII. Trusts  
 executed  
 and execu-  
 tory.**

**VIII.** Express trusts are either executed  
 or executory, in the sense of directory. A  
 trust executed is a trust which appears to  
 be finally declared by the instrument creat-  
 ing it. A trust executory or directory is a  
 trust raised either by stipulation or by a  
 direction, in express terms or by necessary  
 implication, to make a settlement or assur-  
 ance to uses or upon trusts which are indi-  
 cated in, but do not appear to be finally  
 declared by, the instrument containing such  
 stipulation or direction. (Smith's Executory  
 Interests annexed to Fearn, § 489; 2  
 Sp. 128, 129, 131-3; *Lord Glenorchy v.*  
*Bosville*, 1 Lead. Cas. Eq. 2nd ed. 1 *et seq.*;  
*Turner v. Sargent*, 17 Beav. 515; *Doncaster*  
*v. Doncaster*, 3 K. & J. 26; *Fullerton v.*  
*Martin*, 1 Drew. & Sm. 31.) **236.**

In the case of trusts executed, a Court of  
 Equity puts the same construction on tech-  
 nical words as that which is put by a Court  
 of Law on limitations of legal estates. But  
 in the case of trusts executory, Equity con-

siders the apparent intent to be collected from the whole instrument, or, where the language is doubtful, the presumable intent, rather than the strict import of technical words. (See 2 Sp. 131-5; *Sackville-West v. Visc. Holmesdale*, L. R. 4 H. L. 543.) Thus, where the legal estate is limited to one for life, remainder to the heirs male of his body, he takes an estate tail male under the rule in *Shelley's Case*. And where, in a *will* or *voluntary* deed, there is a mere direction to settle an estate on one for life, to be followed by a remainder to the heirs of his body, as there is nothing of an inchoate or executory nature in the instrument itself, and the words are formal and explicit, and there is nothing in the instrument to show or afford a presumption that the words were not intended to be used in their technical sense, the mere reference to a further instrument does not render the trust executory, and therefore the limitations, as regards the rule in *Shelley's Case*, receive the same construction as similar words used in limiting legal estates. But if *marriage articles* express that an estate is to be settled on the husband for life, with remainder to the heirs of his body, there the inchoate nature of the instrument, combined with the allusion to a

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further instrument, renders the trust executory; and as the issue in this case are purchasers for valuable consideration, so Equity will construe the articles as giving an estate for life only to the husband, with a remainder in tail to the children. (2 Sp. 136.) **237.**

IX. Trusts  
governed by  
same rules  
as legal  
estates.

Exceptions.

IX. Trusts in real property, which are exclusively cognizable in Equity, are generally governed by the same rules as legal estates. (1 Sp. 492, 499, 500, 502, 875, 876, 878.) But—1. The construction put upon trusts executory, as we have before seen, differs, in some respects, from that which prevails in regard to legal estates and trusts executed. 2. Before the late Dower Act, Courts of Equity held that trust estates were not subject to dower; because, before the question was tried, it was the general opinion that, by the creation of a trust estate, dower was prevented from attaching; and it is a maxim that *communis error facit jus*; and to have held that trust estates were subject to dower, would have affected a large proportion of the estates in the kingdom. (1 Sp. 501.) 3. An equitable estate, being incapable of livery of seisin and of every form of conveyance which operates by the Statute of Uses, a mere declaration of trust, if in writing signed by the party bound or his

agent lawfully authorized, was held sufficient to transfer such equitable estates; except that a fine or recovery was required, where the same would have been necessary if the estate had been a legal estate. (See St. § 974, 974a, and notes, and § 975; 1 Sp. 497, 500, 506, 877; and as to executory trusts, see *supra*, par. 30, 236, 237.) In practice, however, trust estates have been usually conveyed in the same manner as legal estates. (1 Sp. 506.) 4. Trusts were independent of the rules of the Common Law founded on tenure; so that a life interest in a trust estate was not forfeited on any alienation by the tenant for life. (1 Sp. 500, 505.)

**238.**

X. Long terms for years are often created for securing the repayment of money lent on mortgage, and for other purposes. Prior to the statute 8 & 9 Vict. c. 112, such terms did not determine on the mere performance of the trusts for which they were created, unless there was a special provision to that effect; but the legal interest remained in the trustee, after they were performed; and at Law the term continued to be a term in gross, as distinct and separate from the inheritance as it was at first. But in Equity the term might become attendant on the

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X. Trusts of  
terms.

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inheritance by express declaration, so as to follow the descent to the heir, and all the alienations made of the inheritance, or of any particular estate or interest carved out of it by deed or by will or by act of Law, and so as not to be devisable, before the late Wills Act, without the formalities requisite for devising real estate, and, in short, so as to be governed in Equity by the same rules generally as the inheritance. Again, a satisfied term might become attendant on the inheritance, with the same effect, by mere implication; for, as Equity always considers who has the right to the land in conscience, if the term was not subject to any ulterior limitation to which the inheritance was not subject, and the owner of the inheritance was entitled to the whole trust of the term, it was attendant on the inheritance by implication. **239.**

In consequence of satisfied terms being deemed terms in gross at Law, but capable of being rendered completely subservient to the ownership of the inheritance in Equity, they were often made of the greatest use in protecting the inheritance from mesne estates, charges, and incumbrances. Thus, if a *bond fide* purchaser for valuable consideration, mortgagee, lessee, or other in-

cumbrancer, took a conveyance, lease, or assignment, defective by reason of some estate, charge, or incumbrance, subsequent to the creation of a long-satisfied term for years and prior to his own conveyance, lease, or assignment, and of which he had no notice at the time of his contract, he might effectually protect himself against all persons claiming under such prior estate, charge, or incumbrance, by taking an assignment of the satisfied term to a trustee, for himself, or by taking an assignment thereof to himself where he took the conveyance, lease, or assignment of the estate or interest to be protected in the name of a trustee; for he might use the legal estate in such satisfied term, to defend his possession during the continuance of the term, or, if he had lost the possession, to recover it. (See St. § 998-1002, and notes; Sugd. Concise View, 477.)

**240.**

By the stat. 8 & 9 Vict. c. 112, s. 1, every satisfied term which was attendant on the 31st of December, 1845, was on that day to cease, except that, if attendant by express declaration, it was to afford the same protection as it would have afforded if it had continued to subsist, but had not been assigned or dealt with after that day.

**TIT. II.**  
**CAP. III.**

And by s. 2, every term which, after the 31st of December, 1845, should become satisfied and attendant, was to cease immediately upon the same becoming so attendant. **241.**

An attendant term might at any time be disannexed by the proper acts of the parties in interest, and be turned into a term in gross. (St. § 1002.) **242.**

A trust term may be conveyed, as well as devised, so as to give successive interests to successive takers; whereas a legal term can only be devised in that manner. (1 Sp. 513.) **243.**

**XI. Trusts  
created  
without  
cestui que  
trust's  
knowledge.**

XI. A person in whose favour a trust has been created may affirm it, and enforce the performance thereof, although it was created without his knowledge, if at least it is not revoked by the author of the trust before it is so affirmed. (St. § 972.) **244.**

**XII. What  
trusts will  
be enforced.**

XII. Equity will enforce a trust where it is executed, or where it is raised by will, even though it is a mere voluntary trust; but it will not enforce an executory trust raised by a covenant or agreement, unless it is supported by a valuable consideration. (See cases referred to, St. § 793, 793 a; 2 Sp. 52, 57, n. (e), 129, 255; *Ellison v. Ellison*, 1 Lead. Cas. Eq. 2nd ed. 199 *et seq.* And

as to the distinction between executory and executed, see *supra*, par. 236, 237.) **245.** TIT. II.  
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XIII. Marriage articles will be specifically executed on the application of any person within the scope of the consideration of the marriage, or of those claiming under any such person. But they will not be specifically executed on the application of persons who are volunteers, even of a wife or child by a subsequent marriage; although where the proceeding is by persons who are within the scope of the consideration, or by those claiming under them, Courts of Equity will decree a specific execution throughout, as well in favour of the mere volunteers, as of the plaintiff, as the Courts either execute them *in toto* or not at all. (St. § 986, 987; 2 Sp. 287.) **246.** XIII. Execution of marriage articles.

XIV. Putting the bankrupt and insolvent laws out of the case, a person is at liberty to assign all his property for the benefit of his creditors, though it may be for the purpose of defeating some particular creditor of his execution in an action commenced by him against the debtor. For a debtor, in securing the equal distribution of his effects among all his creditors, is only performing a moral duty. But such an assignment must be free from fraud and misrepresentation. (2 Sp. XIV. Assignments for benefit of creditors.



TIT. II. 350, 352 ; *Worseley v. De Mattos*, Tudor's  
CAP. III. Lead. Cas. Merc. Law, 438 ; *Harman v.*  
*Fishar*, Tudor's Lead. Cas. Merc. Law, 455.)  
**247.**

Preferences and priorities of particular creditors are ordinarily valid, in general assignments made by debtors, in discharge of their debts, except under the laws of bankruptcy and insolvency. (St. § 1036 ; 2 Sp. 350-2.) But a debtor cannot vest his property in one of his creditors for the purpose of hindering and delaying his other creditors, and compelling them to come to terms ; for such a deed is fraudulent and void. (*Smith v. Hurst*, 10 Hare, 30.) **248.**

Assignees under general assignments take only such rights as the assignor or debtor had at the time of the general assignment ; and consequently a prior special assignee will hold against them, without giving notice of his assignment. (St. § 1038.) **249.**

In order to entitle the creditors named in a general assignment for the benefit of creditors to take under it, it is not necessary that they should be technical parties thereto, unless they are named in the assignment as parties, and are expressly required to execute before they can take under its provisions. It is sufficient if they have notice of the trust

in their favour, and assent to it; and if there is no stipulation for a release or any other condition which may render it not for their benefit, their assent will be presumed, till the contrary appears. (St. § 1336 a. See *Biron v. Mount*, 24 Beav. 642.) Until, however, the creditors have assented to the trust, and given notice thereof to the assignee, an assignment of this kind, in which the creditors are not parties, and have not executed, is deemed revocable by the debtor, in Equity as well as at Law, whether the creditors are individually named or not. (St. § 1036 b; *Steele v. Murphy*, 3 Moo. P. C. 445.) **250.**

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CAP. III.

Where creditors have acted under a deed of composition, and treated it as valid, a Court of Equity will also act under it and treat it as valid as against the assignor, though the creditors have not executed it within the time prescribed. (2 Sp. 354.) **251.**

Where there is an assignment to two trustees, and one assents and the other dissents, the property passes to the assenting trustee. (2 Sp. 351.) **252.**

XV. In those cases where a consignment or remittance is made, with orders to pay over the proceeds to a third person, the appropriation is not absolute, but revocable at

XV. Revocableness of a consignment or remittance.

**TIT. II.**  
**CAP. III.**

any time before the third person has assented thereto, and notice of the same has been given to the mandatory; for it amounts to no more than a mandate from a principal to his agent. And it will be revoked by any disposition inconsistent with the execution of the mandate. But after such assent and notice, the third person may avail himself of it in Equity, without any reference to the assent or dissent of the mandatory; for his receipt of the property binds him to follow the order of his principal. (St. § 1045, 1046.)

### 253.

Revocable-  
ness of a  
conveyance  
of equitable  
property, or  
a declara-  
tion of trust  
in favour of  
a volunteer.

Where a person executes and delivers a deed of conveyance of equitable property to a volunteer, or where the legal estate is transferred and a trust of it is declared in favour of a volunteer, and there is nothing upon the face of the transaction or from contemporaneous evidence to show that it was intended to be revocable, or that a power of revocation ought to have been inserted, it cannot be revoked or avoided in any way. And even if the donor should procure a retransfer of stock by the trustees, and where it is in writing, should cancel the instrument, and by will make a provision for the same *cestui que trust*, the settlement will be binding; and unless the subsequent provision is ex-

pressed to be substitutionary, the *cestuis que trust*, if the gift is not by way of portion, will take both; but they will have their election, if it is expressed to be in substitution. And stock not being within the stat. 27 Eliz. c. 4, a purchaser of it from the donor cannot avoid the voluntary settlement or gift. (2 Sp. 882, 883; see *supra*, par. 193, 194.) **254.**

**TIT. II.  
CAP. III.**

The keeping in the donor's possession a deed so executed as to pass the estate is not of itself sufficient to enable the donor to revoke it by cancellation or by will; for, the estate having passed, it would require the active interference of a Court of Equity to revest the estate; and it is no ground for such interference that the act was foolishly or inconsiderately done: (2 Sp. 885.) **255.**

XVI. Where a will contains a direction or power to raise money out of the rents and profits of an estate to pay debts or portions, &c., and the money must be raised and paid without delay, Courts of Equity have so construed those words as to give a power to raise by sale or mortgage, unless restrained by other words. (St. § 1064, 1064 a; 2 Sp. 316.) **256.**

**XVI. Effect of a direction or power to raise money out of rents for debts, &c.**

XVII. Prior to the enactments which will be presently mentioned, where real property

**XVII. Obligation of purchaser to see to the**

TIT. II.  
CAP. III.

application  
of the pur-  
chase money  
—General  
rules.

was devised to be sold for, or was charged with the payment of definite and ascertained sums only, and such payment was to take place at the time when the required amount was to be raised, the purchaser of such property was bound to see that the purchase-money was applied in the fulfilment of the trust, unless expressly exempted by a provision by the author of the trust. But where the property sold constituted the natural and primary fund for the payment of debts generally, or was expressly charged with, or conveyed or devised for, the payment of debts generally, and therefore, in order to ascertain the sums to the payment of which the property was liable, it would be necessary for the purchaser to institute proceedings in Equity, or where the purchaser, if bound to see to the application of the money, would be involved in a trust of long continuance: then, the purchaser, unless he had notice that there were no debts, or notice of fraud, was not bound to see to the application of the purchase-money. (See St. § 1126, 1127, 1128, 1130-4; *Elliot v. Merryman*, 1 Lead. Cas. Eq. 2nd ed. 45 *et seq.*) **257.**

Specific  
points in  
illustration  
of the above  
rules as to  
the pur-

In illustration of these rules, it may be observed that, as the personal estate, whether consisting of chattels personal or of chattels

real, is liable at the Common Law, and constitutes the natural and primary fund for the payment of the debts of the testator generally, the purchaser of the whole or of any part of it, without notice that there were no debts, or that the sale was not made for payment of debts, was not bound to see that the purchase-money was applied by the executors in the discharge of the debts (St. § 1126, 1128 ; 2 Sp. 372, 377); even if the testator had directed his real estate to be sold for payment of debts, whether specified or not, and had made a specific bequest of a part of his personal estate for a particular purpose, or to a particular person, although such specific bequest was known to the purchaser, provided he had no reason to suspect any fraudulent or unauthorized purpose ; for, otherwise, before a person could become a purchaser of personal estate specifically bequeathed, it would be indispensable for him to come into a Court of Equity to have an account taken of the assets of the testator, and of the debts due from him, so as to ascertain whether it was necessary for the executor to sell. (St. § 1129; 2 Sp. 375-7.)

**258.**

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CAP. III.  
—  
purchaser's  
obligation.

The same rule, for the same reason, applied to real estate devised for or charged with the

TIT. II.  
OP. III.

payments of debts generally (St. § 1130; 2 Sp. 380, 382); even though the trust was only to sell, or was a charge for, so much as the personal estate was deficient to pay the debts, and even though a specific part of the real estate was devised for a particular purpose or trust, if the whole real estate was charged with the payment of debts generally by the will. If, however, the trustee has only a power to sell, and not an estate devised to him, then, unless the personal estate is deficient, the power to sell does not arise. (St. § 1131; 2 Sp. 382.) **259.**

Where, in cases of real estate, the trust was for the payment of legacies or annuities only, or of specified or scheduled debts alone, or of both, but not of debts generally, the rule was different; for they are ascertained, and the purchaser must therefore see that the money is duly applied. But where the devise was for payment of debts generally, and also for the payment of legacies or annuities, the purchaser was not bound to see to the application of the purchase-money; because, to hold him liable to see the legacies or annuities paid, would in fact have involved him in the necessity of taking an account of all the debts and assets. (St. § 1132; 2 Sp. 379, 382, 386, 389.) **260.**

And the purchaser was not bound to see TIT. II.  
CAP. III.  
to the application of the purchase-money,  
where the specific objects of the trust were  
not pointed out. (2 Sp. 381.) **261.**

But if there was collusion between the  
purchaser and the trustees, who were guilty  
of a misapplication, or if there was notice  
that the sale or mortgage was made for the  
purpose of a breach of trust, the estate was  
liable. (2 Sp. 384.) **262.**

In determining as to the liability of the  
purchaser, the Court looked to the deed or  
will alone, and not to the circumstances of  
the testator or to subsequent events ; so that  
where a testator created a trust or charge for  
payment of debts generally and legacies, and  
there were no debts at the death of the  
testator, or the debts were paid after the death  
of the testator, and the legacies only were left  
as a charge, that circumstance alone did not  
prevent the application of the rule. (2 Sp.  
383 ; *Stroughill v. Anstey*, 1 D. M. & G. 653.)  
**263.**

Where the time appointed by the devise  
for the sale of real estate had arrived, and  
the persons entitled to the money were in-  
fants or unborn, there the purchaser was not  
bound to see to the application of the purchase-  
money, because that might have involved



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him in a trust of long continuance. But if an estate was charged with a sum of money payable to an infant at his majority, the purchaser was bound to see the money duly paid on his coming of age ; for the estate remained chargeable with it in his hands. (St. § 1133 ; 2 Sp. 387.) **264.**

Where the money was to be applied by the trustees to purposes which required, on their part, time, delay, and discretion, it seems the purchaser was not bound to see to the application of the purchase-money. (St. § 1134 ; 2 Sp. 387.) **265.**

By the stat. 22 & 23 Vict. c. 35, s. 23, it is enacted that the *bond fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security. By the stat. 23 & 24 Vict. c. 145, s. 12, it is also enacted that receipts for purchase-money given by the persons exercising the power of sale thereby conferred on mortgagees shall be sufficient discharges to the purchaser, who shall not be bound to see to

the application of the purchase-money. And TIT. II.  
CAP. III. by s. 29 it is also enacted, that the "receipts in writing of any trustees or trustee, for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof." A general power to give receipts was provided by the stat. 7 & 8 Vict. c. 76, but it only extended from the 1st of January to the 1st of October, 1845, from which day it was repealed. **266.**

XVIII. As long as the relation of trustee XVIII.  
When lapse  
of time will  
bar a cestui  
que trust. and *cestui que trust*, under an express trust, is acknowledged to exist, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. (St. § 1520a; 2 Sp. 48, 62; *Stone v. Stone*, L. R. 5 Ch. Ap. 74; *Thomson v. Eastwood*, L. R. 2 Ap. Cas. 215.) And it may be observed, that where a sum of money is bequeathed to an executor, upon trust, to be laid out on certain trusts, as soon as it is severed from the bulk of the estate, it ceases to be a mere legacy, and the bar of the Statute of Limitations does not

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**CAP. III.**

apply : for it is then a case of express trust, which is specially excepted. (2 Sp. 62 ; *Thomson v. Eastwood*, L. R. 2 Ap. Cas. 215.) But when this relation of trustee and *cestui que trust* is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumption unfavourable to its continuance, a Court of Equity will refuse relief, upon the ground of lapse of time and its inability to do complete justice. (St. § 1520a.) **267.**

Statutes of  
Limitation  
inapplicable  
to express  
trusts.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2), " No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." **268.**

**XIX.** Trust  
performed  
as to the  
main intent.

**XIX.** There are numerous instances in which the Court has caused the main intent, namely, the trust, to be performed, where the qualifications intended to secure its due performance have in fact presented obstacles to its being performed at all ; as where the consent of a particular person is required, and such consent is perversely withheld, or cannot be obtained by reason of his infancy. (2 Sp. 45.) **269.**

XX. The legal and equitable estates may co-exist separately and distinctly in the same person, unless they are both co-extensive and of the same quality; in which case the equitable estate will merge in the legal estate, or rather will so coalesce with it as to cease to have any separate existence. (See 2 Sp. 879, 880.) **270.**

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XX. Where legal and equitable estates have no separate existence.

XXI. A Court of Equity will enforce, in favour of the Crown, a trust of real estate for an alien created prior to the Naturalization Act, 1870 (33 Vict c. 14). (*Sharp v. St. Sauveur*, L. R. 7 Ch. Ap. 343.) **271.**

XXI. Trust for an alien

**TIT. I.**  
**CAP. IV.**

chaser for valuable  
*bond fide* purchase  
grantor acquired  
Equity will not  
settlor to enable  
for sale against

**193.**

The law that  
voluntary settl  
estate just as  
highly unreason  
now lay hold  
tuting a com  
grantee to the  
of the category  
Malins, in *R.*  
218.) **194.**

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relief for the  
2 Sp. 46, 62,  
74; *Thomas*.  
215.) *Am.*

## CHAPTER IV.

### OF EXPRESS CHARITABLE TRUSTS (a).

**TIT. II.**  
**CAP. IV.**

**I. Charities  
favoured.**

**I. CHARITIES** are so highly favoured in the Law that charitable gifts have received a more liberal construction than gifts to individuals. (St. § 1165 ; 2 Sp. 246, 247.)  
**272.** Thus—

**In regard to  
the want of  
proper  
trustees :**

1. In regard to the want of proper trustees, if a testator makes a bequest for charity to such persons as he shall afterwards name executors, or to such persons as his executors shall name, and he appoints no executors, or the executors die in the lifetime of the testator and no other are appointed ; or if the trustees

(a) On the subject of jurisdiction in case of Charities, the reader is referred to Mr. O. D. Tudor's valuable work on the Law of Charitable Trusts, 2nd ed., and to Story's Eq. Jur. § 1142 *et seq.*, and the Act for the better Regulation of Charitable Trusts, 16 & 17 Vict. c. 137, and the Acts to amend it, 18 & 19 Vict. c. 124, 23 & 24 Vict. c. 136, and 32 & 33 Vict. c. 110. And as to Roman Catholic Charities, see 23 & 24 Vict. c. 134. By these Acts jurisdiction has, in certain cases, been conferred upon the Chancery Judges in Chambers, the Court of Chancery of the County Palatine of Lancaster, and the Charity Commissioners.

of a charitable legacy all die in the testator's lifetime; or if a corporation intrusted with a charity fails; the Supreme Court will execute the charity. (St. § 1165, 1166, 1177.) So if a legacy is given to persons who have no legal corporate capacity to enable them to take as a corporation; as where a legacy is given to the churchwardens for a charitable purpose. And so if a corporation for whose use a charity is designed is not *in esse*, and cannot come into existence but by some future act of the Crown. (St. § 1169, 1170.) **273.**

2. The Supreme Court will supply all defects in conveyances, where the vendor is capable of conveying, and has a disposable estate, and the mode of conveyance does not contravene any statute. (St. § 1171.) **274.**

3. In regard to the object, it matters not how uncertain the persons or objects may be. For if a bequest is made in the most general and indefinite manner simply for charitable uses, or religious and charitable purposes, *eo nomine*, the Supreme Court will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit. But where the bequest may, in conformity to the expressed words of the will, be disposed of in charity of a

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in regard to  
defects in  
convey-  
ances :

in regard to  
the objects :



TIT. II.  
CAP. IV. discretionary private nature, or be employed for any general benevolent or useful purposes, or for any general purpose, whether charitable or otherwise, or for charitable or other general purposes, at discretion, the bequest will be void as being too general and indefinite for the Court to execute, and the property will go to the next of kin. Hence if a man bequeaths a sum of money to such charitable uses as he shall direct by a codicil annexed to his will or by a note in writing, and he leaves no direction by note or codicil, the Court will dispose of it to such charitable purposes as it shall think fit. (St. § 1167; *In re Jarman's Estate*, L. R. 8 Ch. D. 584.) But a bequest for such benevolent, religious, and charitable purposes, or for such charitable or public purposes, as the trustees should think most beneficial, is void. (See St. § 1157, 1158, 1164, note 4 to 6th ed., 1167, 1169, 1183; *Wilkinson v. Lindgren*, L. R. 5 Ch. Ap. 570; *In re Kilvert's Trusts*, L. R. 12 Eq. 183; 7 Ch. Ap. 170.) And yet it has been held that a bequest for such charities and other public purposes in the parish of, &c., is a good charitable bequest, as it must mean public purposes for the benefit of that parish, and therefore would refer to charities within the

meaning of the statute, 43 Eliz. c. 4. (*Dolan* TIT. II.  
CAP. IV.  
v. *Macdermot*, L. R. 5 Eq. 60; 3 Ch. Ap.  
676.) **275.**

Where the giver has specified any particular charitable object, which is contrary to the policy of the Law, or from some other reason cannot be accomplished at all, or not in the way prescribed, the Court will devote the property to some other charitable purpose, if the nature of the gift, or the concurrence of other charitable gifts in the same instrument, indicates that, although the specified object was the favourite, yet it was not the exclusive object of the giver, but that he would have substituted some other charitable object, had he imagined that his favourite design might possibly be incapable of being accomplished. This is called the *cy près* doctrine, and where the residue is given to charity, that will not oblige the Court to devote the particular gift which fails to the objects of the residuary gift. (*Mayor of Lyons* v. *Advocate-General of Bengal*, L. R. 1 App. Cas. 92.) But where no such indication appears (as where the testator's object is to build a church at W., and that cannot be effected), the next of kin will take. (See St. § 1167-9, 1172, 1176, 1181, 1182; *Russell* v. *Kellett*, 3 Sm. & G. 264;

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*Sinnett v. Herbert*, L. R. 12 Eq. 201 ; reversed, L. R. 7 Ch. Ap. 232.) Where there are no objects *in esse*, but some may arise, the Court will keep the fund for them. And where there can be no such objects as those which are specified, or when the specified objects cease to exist, the Court will remodel the charity. (St. § 1169, 1170, 1170a, 1176 ; 2 Sp. 79.) **276.**

in regard to  
surplus  
income ;

4. In regard to surplus income, if a testator clearly shows an intention to devote the whole income of a property to charitable purposes, it will be so applied, although his specific charitable dispositions do not exhaust the whole income. (2 Sp. 248 ; *Att.-Gen. v. Corp. of Beverley*, 15 Beav. 540 ; 6 D. M. & G. 256, 265 ; 6 H. L. Cas. 310 ; *Att.-Gen. v. Trin. Coll. Camb.*, 24 Beav. 383.) And when the increased revenues of a charity are more than sufficient for the specified objects of charity, the surplus will not go to the heir-at-law or next of kin of the founder, but will be applied to the augmentation of the benefits of the charity, or to other charitable purposes. (St. § 1178, 1181 ; 2 Sp. 248 ; *Philpott v. St. George's Hospital*, 27 Beav. 107 ; *Re Ashton's Charity*, 27 Beav. 115 ; *Merchant Taylors' Comp. v. Attorney-General*, L. R. 11 Eq. 35 ; 6 Ch. Ap. 512.) **277.**

5. And to give another instance of the favour shown to charity, lapse of time is not an equitable bar in the case of charitable trusts. (St. § 1192a; *Att.-Gen. v. Corp. of Beverley*, 6 D. M. & G. 256, 265.) But the Statute of Limitations, 3 & 4 Will. IV. c. 27, s. 24, applies to charities. (*Magdalen Coll. v. Att.-Gen.*, 6 H. L. Cas. 189; *Att.-Gen. v. Davey*, 4 D. & J. 136.) **278.**

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CAP. IV.

in regard to  
lapse of  
time.

II. Where money is bequeathed to charitable purposes abroad, the Supreme Court will secure the fund, and cause the charity to be administered under its own direction, provided the charitable purposes are to be executed by persons residing within the jurisdiction of the Court. (St. § 1186, 1300.) But this will not be done if the objects of the charity are against Law or public policy, unless the principle of such policy or Law is of a national or conventional, rather than of a universal and moral or religious character. (See St. § 1184, 1185.) **279.**

II. Charities  
abroad.

III. It seems that, with a view to encourage the discovery of charitable donations given for indefinite purposes, it is the practice for the Crown to reward the persons who made the communication, if they can bring themselves within the scope of the charity, by giving them a part of the fund ; and the

III. Reward  
to in-  
formers.

TIT. II.  
CAP. IV.

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IV. Altering  
charity.

like practice takes place also in relation to  
escheats. (St. § 1192.) **280.**

IV. A charity cannot be altered by any  
new agreement between the heir of the donor  
and the donees. (St. § 1175.) **281.**

## CHAPTER V.

## OF IMPLIED TRUSTS.

AN implied trust is a trust which is founded on an unexpressed but presumable intention. (See St. § 1195, 1254.) **282.**

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CAP. V.

Definition.

I. Where, in the case of a will or other instrument, the donor of a power has a general intention in favour of a class, and a particular intention in favour of individuals of that class to be carried out by the donee of the power, and the particular intention fails, from its not being carried out by the donee of the power, the Court will treat it as a trust, and carry into effect the general intention in favour of the class. (St. § 1061a; 3 Sp. 82, 420; *Harding v. Glyn*, 2 Lead. Cas. Eq. 2nd ed. 805 *et seq.*) **283.**

I. Effectuating the general intention of the donor of a power.

Thus, if a fund is given to such of a certain class of persons, or to a certain class of persons in such proportions, as a third person shall appoint, if no appointment is made, the objects named will take equally. (2 Sp. 83; *Salisbury v. Denton*, 3 K. & J. 529; *Reid v. Reid*, 25 Beav. 469; *Re White's*

TIT. II. *Trusts*, Johns. 656; *Lambert v. Thwaites*,  
CAP. V.

L. R. 2 Eq. 151.) But if a person, making no gift himself, merely empowers another to give property, the gift must be made, or no person can claim, though the persons to whom the intended gift was to be confined are named. (2 Sp. 84.) **284.**

I. Where trusts fail,

or the property is un-  
exhausted  
by the trust.

II. Where property is given upon trust, and the trusts fail, either entirely or partially, by reason of the failure of the intended objects or purposes, or some of them, or of the illegality or indefinite nature of the trusts, or some of them, or otherwise; or where the trusts are fully and finally fulfilled, without exhausting all the property out of which they were to be fulfilled, there is a resulting trust of such property or of so much thereof as remains unexhausted, to the person creating the trust, or to his heir or legal representatives, unless there is sufficient evidence or presumption of a contrary intention, or the trust is a charitable trust. (St. § 1196a, 1200; 1 Sp. 510; 2 Sp. 22, 80, 243-6; 1 Cru. T. 12, c. 1, § 55, 56; 1 Jarm. on Wills, 2nd ed. 475, 482; *Att.-Gen. v. Greenhill*, 33 Beav. 193.) **285.**

Absolute gift, with an ineffectual or partial

But where there is an absolute, and, for anything that appears to the contrary, a

beneficial gift, with an ineffectual or partial trust engrafted on it, the property, or so much as is unexhausted by such partial trust, will remain in the donee. (See 1 Sp. 510; 2 Sp. 23, 80.) And where there is an absolute gift, with an illegal condition, the condition is void, and the donee may retain the whole: as where a testator bequeathed leasehold property upon condition that the legatee should assign a particular part to a charity. (2 Sp. 229.) **286.**

TIT. II.  
CAP. V.

trust or a  
void con-  
dition.

III. An implied resulting trust also arises where a conveyance, transfer, devise, or bequest of land or other property, without any consideration, express or implied, real or nominal, purports or is proved to have been made upon trust, but no distinct use or trust is stated. (St. § 1197, 1199; 2 Sp. 57, 199, 225, 226; *Briggs v. Penny*, 3 Mac. & G. 546.) **287.**

III. Convey-  
ance with-  
out a con-  
sideration  
and without  
a use or  
trust.

If there are any circumstances to show that a trust was intended, then the onus of proof is on the donee, to prove that a beneficial gift to him was intended. If there are circumstances from which it can be made out that it would be a fraud in the grantee to retain the property as his own, parol evidence may be given of such circumstances. If no such circumstances exist,



**TIT. II.**  
**CAP. V.**

the conveyance or transfer, if perfect, will be regarded as a beneficial gift. (2 Sp. 199.) **288.**

If a devise is to an infant or a married woman, the presumption is against the devise being upon trust; yet this presumption must yield to the fair construction of the will, if, according to that, the testator appears to have intended a trust. (2 Sp. 225.) **289.**

A discretion as to the application of the property given may be so large, that the gift may amount to an absolute gift; as where there is an uncontrolled power to give away the property as and to whom the donee may think fit. But if the discretion is limited to certain general purposes, though they may be too indefinite to be enforced, the donee is a trustee. (2 Sp. 225.) **290.**

**IV. Limita-  
tion of a  
particular  
interest  
only.**

**IV.** Where a person parts with or limits a particular estate only, and leaves the residue undisposed of, the residue results to him, even though there may be a consideration. (St. § 1199.) **291.**

The heir will take, as personal estate, the benefit of the surplus interest in a term or other particular interest carved out of the inheritance for a particular purpose which does not exhaust the whole, as against the

devisee, where the devisee takes only what remains after the particular interest so given is carved out. (2 Sp. 230.) **292.** TIT. II.  
CAP. V.

A legacy to the heir or next of kin will not of itself preclude their claim to the surplus undisposed of. Nor will a bare intention to exclude, however expressed, though accompanied by words of anger or antipathy or even negative words, be sufficient to exclude the heir in respect of the beneficial interest in real estate undisposed of, or the next of kin in respect of personalty, unless it is either specifically or as part of a fund effectually devised or bequeathed away to some one else, either directly, or by the same kind of necessary implication as would in other cases be admitted to constitute an actual gift. (2 Sp. 232.) **293.**

V. Before the Statute 1 Will. IV. c. 40, where a testator made no express disposition of the residue of his personal estate, the executors were at Law entitled to such residue; and Courts of Equity, as the Act recites, so far followed the Law, as to hold the executors to be entitled to retain such residue for their own use, unless it appeared to have been the testator's intention to exclude them from the beneficial interest therein. In that case they were held to be

V. Undisposed of residue of testator's personal estate.

TIT. II.  
CAP. V.

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trustees for the person or persons who would have been entitled to such estate under the Statute of Distributions, if the testator had died intestate. And Equity laid hold of any circumstance or expression in the will, which might appear to rebut the presumption of a gift to the executors, and convert them into trustees for those on whom the Law would have cast the surplus in case of a complete intestacy. (See St. § 1208 and note; *Elcock v. Mapp*, 3 Cl. & Fin. 507, 508; *Underwood v. Wing*, 4 D. M. & G. 633, 656, 659; *Powell v. Merrett*, 1 Sm. & G. 381; *Cradock v. Owen*, 2 Sm. & G. 241; *Read v. Stedman*, 26 Beav. 495; *Saltmarsh v. Barrett*, 29 Beav. 474.) The stat. 1 W. IV. c. 40, furthers the views of Courts of Equity, in narrowing the application of the rule of Law, by enacting, as to wills made by persons who should die after the first day of September, 1830, that the executors shall be deemed by Courts of Equity to be trustees for the persons (if any) who would be entitled under the Statute of Distributions in respect of any residue not expressly disposed of, unless it should appear by the will, or a codicil thereto, that the executors were intended to take such residue beneficially. (See

*Harrison v. Harrison*, 2 Hem. & M. 237.) TIT. II.  
CAP. V.  
**294.**

VI. Where real estate is directed to be sold for certain purposes, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the testator's death, from silence, or the inefficacy of the will itself, or from subsequent lapse, results to the heir, unless the testator has sufficiently declared his intention that the produce of the real estate should be deemed personalty, whether such purposes take effect or not; and where the sale is necessary, it results to the heir as personalty; but where the sale is unnecessary, it results as part of the old use, and descends to him as realty. (2 Sp. 233; *Ackroyd v. Smithson*, 1 Lead. Cas. Eq. 2nd ed. 690 *et seq.*; *Taylor v. Taylor*, 3 D. M. & G. 190; *Robinson v. Governors of London Hospital*, 10 Hare, 19; *Buchanan v. Harrison*, 1 Johns. & H. 662, 675.) If the testator directs, either expressly or by necessary implication, that the proceeds of the real estate shall be considered as having been converted into personalty before his death, and *a fortiori*, if he directs that "it shall be treated as personal estate for every purpose, whether disposed of by his will or not,

VI. Undisposed of produce of real estate.

TIT. II.  
CAP. V.

and whether as regards legatees or next of kin," such a direction operates to give the next of kin, as against the heir, any portion of the proceeds that may lapse or may not be effectually disposed of. (2 Sp. 237.) But a mere direction that the proceeds of the real estate "shall be deemed part of the personal estate," or even that they shall be "considered to all intents and purposes part of the personal estate," or "shall be a fund of personal and not of real estate," or a reference to a mixed fund by the name of "personal estate," is not sufficient to give the surplus of the real estate to the next of kin. And any purpose, however limited (as payment of costs), apparent upon the face of the will, with reference to which the conversion might have been directed, is conclusive against the next of kin. (2 Sp. 238; *Taylor v. Taylor*, 3 D. M. & G. 190; *Robinson v. Governors of London Hospital*, 10 Hare, 19.) **295.**

If a testator converts his real estate for all the purposes of his will, so as to affect the character of the property as between the real and personal representatives of persons taking under the will, that will not prevent the heir from taking any part which is undisposed of, by way of resulting trust. (2

Sp. 234.) But what he so takes will vest in him as personal estate (2 Sp. 242), unless TIT. II.  
CAP. V.  
the other parts are devoted to the payment of charges, and he chooses to pay them off, and thereby prevent the sale, and take the estate. (2 Sp. 234.) **296.**

Where real estate is not made a subsidiary fund, but a testator creates from real and Undisposed  
of part of  
mixed fund. personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain purposes, as for the payment of debts and legacies, there he in effect directs that the real and personal estates, which have been converted into that fund, shall answer the stated purposes *pro rata* according to their respective values. If any of those purposes fail, then the part of the fund which upon this principle would otherwise have been applicable to those purposes, is undisposed of. So far as that part of the fund has been composed of real estate, the heir is to have the benefit of it, as so much real estate undisposed of, whether the estate be eventually sold or not; and so far as that part of the fund has been composed of personal estate, it is personal estate undisposed of, for the benefit of the next of kin. (2 Sp. 235.) **297.**

Where money is bequeathed to be laid Undisposed  
of part of

**TIT. II.** out in land, the same principle applies as  
**CAP. V.** where land is directed to be converted  
 money directed to be converted, or of the produce thereof. into money: the conversion will operate only so far as the will disposes of the land into which it is to be converted; so that if the land is devised for a limited estate only, the produce of the fund, or the fund itself, if unconverted, beyond the interest so given will result to the testator's next of kin, as personalty, unless it is given away to some other person. (2 Sp. 235; *Reynolds v. Godlee*, Johns. 536, 582.) **298.**

Where personal estate is bequeathed upon trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as real estate. (*Curteis v. Wormald*, L. R. 10 Ch. D. 172.) **298a.**

Failure of objects for conversion under a deed.

Where real estate is settled by deed, upon trust to sell for certain specified purposes, and one of those purposes fails, there, whether the trust for sale is to arise in the lifetime of the settlor or not until after his decease, the property to that extent results to the settlor, as personalty, from the moment that the deed is executed, and not to his heir, either as real or as personal estate. For, the deed takes effect the moment it is executed, and a constructive conversion

immediately takes place by force of the direction to convert, although the actual conversion is not to take place until after the settlor's death. (*Clarke v. Franklin*, 4 K. & J. 257.) But where the whole of the purposes for which the conversion is directed fail from the moment of the execution of the deed, there the Court regards the case as if no conversion had been directed, and the property results to the grantor as real estate. (See Lord Eldon's remarks in *Ripley v. Waterworth*, 7 Ves. 435, and V.-C. Wood's remarks in *Clarke v. Franklin*, 4 K. & J. 265.) **299.**

Where, in the events that happen, the contemplated object for which a conversion of land into money or money into land is directed by will to be made, does not exist, the Court will not vary the property from that state in which it was found at the death of the testator; for where the purpose fails, the intention fails. (2 Sp. 234, 261; *Buchanan v. Harrison*, 1 Johns. & H. 662, 673.) But where any event has happened on which the conversion ought to take place, though the object for the conversion afterwards ceases to exist, or partially fails, the property will be treated as if converted. (See 2 Sp. 262; *Bagster v. Fackerell*, 26

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**CAP. V.**

Failure of  
the object  
for a conver-  
sion under  
a will.



**TIT. II.** Beav. 469 ; *Wall v. Colshead*, 2 D. & J. 683.)  
**CAP. V.** **300.**

VII.  
 Charges.  
 Devise or  
 bequest in  
 trust to pay  
 debts and  
 charges.

Devise or  
 bequest  
 charged  
 with or sub-  
 ject to debts  
 and charges.

Indirect  
 charge of  
 debts.

VII. Implied trusts are often created by charges. Where a testator devises an estate or makes a bequest in trust to pay debts or other charges, no beneficial interest passes to the devisee, or legatee, but he is a mere trustee for the payment of debts or charges, and as to the residue, after payment thereof, a trustee for the heir or next of kin. But where property is devised or bequeathed, charged with or subject to debts or other charges, the whole beneficial interest passes to the devisee or legatee, subject only to the payment of the debts or other charges. (St. § 2245 ; 2 Sp. 23, n. (b), 226 ; *Heptinstall v. Gott*, 2 Johns. & H. 449 ; *Clarke v. Hilton*, L. R. 2 Eq. 810.) **301.**

In the interpretation of wills, favour to creditors has been an acknowledged principle of construction. (2 Sp. 327, n. (g).) And real estate may be charged by will with the payment of debts, even by a mere expression of an intention that the testator's debts should be paid, without any other indication that they are to be paid out of the real estate, and whether such expression is contained at the beginning of the will or in any other part. But if a testator directs a

particular person to pay, it is natural to presume that the testator intended him to pay out of the funds with which he is intrusted, and not out of other funds over which he has no control; and if the executor is pointed out as the person to pay, that ordinarily excludes any presumption that other persons, not named, are to pay, or that the debts are to be paid out of the real estate. (See St. § 1246, 1247, 1247a; 2 Sp. 320-2; *Silk v. Prime*, 2 Lead. Cas. Eq. 2nd ed. 82, 95 *et seq.*) But when a will contains a direction to the executor to pay the testator's debts, and then a devise of real estate to him, it is considered that the testator has imposed upon the executor the duty of paying the debts to the extent of the property given to him, and accordingly the realty is held to be charged with the debts. (*Harris v. Watkins*, Kay, 438; *Hartland v. Murrell*, 27 Beav. 204.) **302.**

TIT. II.  
CAP. V.

Where lands are subjected by deed to payment of debts, they will stand charged with such debts only as were owing at the time of making the deed, unless a contrary intention appears on the face of the deed. But the reverse is the case where the charge is by will. (2 Sp. 352, 353). **303.**

Extent  
charge.

If a legacy is given generally, the legatee

Charge of  
legacies.

TIT. II.  
CAP. V.

must resort to the personal estate only. (2 Sp. 327, 334, 342). But it may be charged on real estate either expressly or by plain implication. (See 2 Sp. 327-9, 342.) Thus, where a testator makes a provision in the same clause for payment of debts and legacies together, the natural inference is that he intends both to be paid in the same way; and, therefore, if the debts are payable out of a mixed fund, so will be the legacies. So when a devise is made in a residuary form, and yet there is no previous devise, legacies are thereby made a charge upon the real estate; it being considered that the word residue must mean the residue of the real estate after payment of the legacies thereout. But even where there has been a previous devise, which was sufficient of itself to account for the residuary form of a subsequent devise, it has been held that such residuary form rendered legacies a charge upon the real estate, especially where the executor was residuary devisee. (2 Sp. 328; *Silk v. Prime*, 2 Lead. Cas. Eq. 2nd ed. 98 *et seq.*; *Francis v. Clemow*, Kay, 435, and cases there cited; *Harris v. Watkins*, Kay, 438; *Wheeler v. Howell*, 3 K. & J. 198; *Greville v. Browne*, 7 H. L. Cas. 689; *In re Brooke*, *Brooke v. Rooke*, L. R. 3 Ch. D. 630.) **304.**

A general charge of legacies on real and personal estate, even though expressed to be on "all the testator's estates of every description, both real and personal," will not render real or personal estate specifically devised or bequeathed liable to pecuniary legacies, in case of a deficiency in the personal estate; for, the specific devisee or legatee is as much an object of the testator's bounty as the pecuniary legatee. (Coote Mortg. 3rd ed. 476; 6 Cru. T. 38, c. 16, § 21; *Conron v. Conron*, 7 H. L. Cas. 168.) **305.**

Even where real estate is charged, it will not be held to be liable until after the general personal estate is exhausted, unless there is an intention to exonerate the personal estate (2 Sp. 338); as where nothing is given to the legatee, but a sum to be raised out of the real estate, or where a portion of the real estate or its produce is appropriated as a fund for payment of the legacies. (2 Sp. 342.) **305a.**

Whether real estate is subject to debts or legacies, or both, by way of trust, or of charge, or of legal power in the nature of a trust, the estate can only be turned into money, and the proceeds distributed, in case of dispute or difficulty, through the agency of a Court of Equity. (2 Sp. 365.) **306.**

TTT. II.  
CAP. V.

Mode of  
giving effect  
to charges.

TIT. II.  
CAP. V.

Where an authority to sell is given to a particular person, the vendee takes under the will: any right or title in the heir is excluded, and there is no need of his joining in the sale. (2 Sp. 366.) **307.**

A charge for payment of debts gives the creditors a priority over the special purposes of the devise. (2 Sp. 368.) **308.**

Where the estate is charged with annuities, it is not the course to discharge the lands: they will still be charged in the hands of a purchaser. (2 Sp. 369.) **309.**

Where annual and gross charges are to be raised out of the rents and profits, or by sale or mortgage, if those words are evidently used in contradistinction, the annual charges will be raisable out of the annual rents and profits, and the gross charges by sale or mortgage. (2 Sp. 370.) But a Court of Equity will in general consider a charge on the rents and profits to raise portions, legacies, or debts, as a charge on the land, if such charge is not restrained to the annual profits, and will imply a power to sell or mortgage. (2 Sp. 406; *Lord Londesborough v. Somerville*, 19 Beav. 295; *Metcalf v. Hutchinson*, L. R. 1 Ch. D. 591.) And yet if no time for payment is appointed, as a general rule a sale will not be decreed,

but it must be raised in the manner directed. **TIT. II. CAP. V.**  
 (2 Sp. 406.) **310.**

VIII. Con-  
veyance,  
assignment,  
or security,  
in another's  
name.

\* VIII. Where a person buys freehold, copyhold, or leasehold lands, and pays the purchase-money for it, but takes the conveyance or assignment in his own name and that of another or others, or exclusively in the name of another or others whether jointly or successively, the trust of the legal estate will result to the person who advanced the purchase-money; for it is presumed that the real purchaser intended the purchase to be for his own benefit, and took it in the name of another or others merely to answer some collateral purpose. The same doctrine is applied to securities taken in the name of a third person. (St. § 1201, 1201a; 1 Sp. 511; 2 Sp. 201, 219; *Dyer v. Dyer*, 1 Lead. Cas. Eq. 2nd ed. 165 *et seq.*) And proof of the payment of the purchase-money by the real purchaser may be furnished either by the language of the deed itself, or by some memorandum or note of the nominal purchaser, or by his admissions in legal proceedings, or by papers left by him and discovered after his death. (St. § 1201, note; 2 Sp. 202.) **311.**

In like manner, there will be a resulting trust, where stock is purchased in the names **Purchase or transfer of stock or delivery of money.**

TIT. II.  
CAP. V.

of the purchaser and a stranger, or is transferred by the owner into the names of himself and a stranger. But if a man delivers money or transfers stock to another, even though he is a stranger, no implied trust will arise, unless upon evidence. (2 Sp. 219.)

### 312.

Where a  
resulting  
trust is  
rebutted ;

No resulting trust will be raised, where a contrary intention, unrebutted by other evidence or grounds of presumption, is indicated by the terms or the object and purpose of the instrument creating the trust, or is established by written or parol evidence, or may be presumed from the relation between the parties. (St. § 1196a, note, and 1202 ; *Beecher v Major*, 2 Dr. & Sm. 431.) And hence, in general, there will be no resulting trust where a purchase is made or a security is taken by a husband or a father (either solely or jointly with his own name or that of a stranger) in the name of a wife, or in the name of a legitimate child, or an illegitimate child, if treated as a child, who is unprovided for, or considered by the husband or father as unprovided for, or as insufficiently provided for ; or by a grandfather in the name of his grandchild unprovided for, or considered by him as unprovided for, or as insufficiently provided for, where the father is not living ;

as where a  
purchase or  
security is  
taken in the  
name of a  
wife or  
child.

or by a widowed mother in the name of her child; because it will be presumed that it was intended as an advancement and provision in discharge of a moral obligation, or as a tribute of affection; unless there are circumstances which furnish a strong presumption of a contrary intention; such as a contemporaneous declaration or act to manifest an intention that the party should take as a trustee. A subsequent act or declaration will not suffice to negative an advancement. Nor will possession or receipt of the rents by the person who advanced the money, where it may be fairly regarded as having been had as a trustee for the other party. (*Dumper v. Dumper*, 3 Gif. 583; *Drew v. Martin*, 2 Hem. & M. 130; *Williams v. Williams*, 32 Beav. 370; *Tucker v. Burrow*, 2 Hem. & M. 515; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Hepworth v. Hepworth*, L. R. 11 Eq. 10; *Stock v. McAvoy*, L. R. 15 Eq. 55; *Batstone v. Salter*, L. R. 19 Eq. 250; 10 Ch. Ap. 431; and see next paragraph.) But the presumption of advancement may be negatived by the oath of the husband or father that no advancement was intended (*Devoy v. Devoy*, 3 Sm. & G. 403); or by his both receiving and applying the income in the same way as that of his general property. (*Bone v.*

TIT. II.  
CAP. V.



TIT. II. *Pollard*, 24 Beav. 283; *In re Ekyn's Trusts*,  
CAP. V. L. R. 6 Ch. D. 115.) **313.**

In other cases where the relationship is not such as to ground a presumption of advancement, the recognition of relationship and expressions of affection or regard ought to be looked to, in determining whether a beneficial gift was intended. (St. § 1202-5, and note; 2 Sp. 214-219, 227, 228; *Jeanes v. Cooke*, 24 Beav. 513, 521.) **314.**

IX. Limitations which would create a joint-tenancy at Law.

IX. Limitations which confer an estate in joint-tenancy at Law have the same effect in Equity, when there are no circumstances which afford grounds for a departure from the rule of Law. So that where two or more persons purchase lands, and advance the money in equal shares, and take a conveyance to them and their heirs, this is a joint-tenancy. But joint-tenancy is not favoured in Equity: indeed Courts of Equity will lay hold of any circumstances which will enable them to vary in this respect from their practice of following the Law. Thus, if two persons advance a sum of money by way of mortgage, and take a mortgage to them jointly, and one of them dies, his representatives will be entitled to his proportion as a trust. So if two persons jointly purchase an estate, and pay unequal pro-

Joint mortgage.

Joint purchase.

portions of the purchase-money, and take the conveyances in their joint names; in case of the death of either of them, there will be no survivorship, but they will be deemed to be purchasers in the nature of partners, and to have intended to hold the estate in proportion to the sum which each advanced. (St. § 1206; 2 Sp. 206, 207, n. (a), 214; *Lake v. Craddock*, 1 Lead. Cas. Eq. 2nd ed. 145 *et seq.*) And where real or personal estate is purchased for partnership purposes in trade, and on partnership account, the legal estate, in whomsoever it may be vested, is in Equity deemed to be partnership property not subject to survivorship. (St. § 1207; 2 Sp. 207; 2 Bl. Com. 399.) **315.**

X. When a person has covenanted to lay out money in the purchase of land, or to pay money to trustees to be laid out in the purchase of land to be settled, if he afterwards purchases land to himself and his heirs, but does not settle it, the land will be subject to the trusts upon which the land to be purchased was to be settled; for, unless the contrary clearly appears, it will be presumed that he purchased in fulfilment of his covenant, upon the principle that acts capable of being considered as done in ful-

X. Covenant  
or trust to  
purchase  
lands.

K

**TIT. II.** filment of an obligation shall be so construed.  
**CAP. V.** (St. § 1210; 2 Sp. 204-6; *Wilcocks v. Wilcocks*, 2 Lead. Cas. Eq. 2nd ed. 345 *et seq.*; *Blandy v. Widmore*, 2 Lead. Cas. Eq. 2nd ed. 347 *et seq.*) And where a trustee or agent is bound by a trust to lay out money in land, if he actually lays it out, the act will, if possible, be presumed to have been done in execution of the trust. (2 Sp. 204-6; *Manningford v. Toleman*, 1 Coll. C. C. 670; *Ex parte Poole*, 11 Jur. 1005.) **316.**

**XI.** Cove-  
nant to  
settle lands.

**XI.** It is a general rule, that if a settlor covenant to convey and settle lands, without specifying any in particular, such covenant will not constitute a specific lien on his lands, and the covenantee will be deemed a creditor by specialty only (St. § 1249); for he may have intended to purchase land for the purpose, instead of settling any part of the land he then had. **317.**

**XII.** Col-  
lateral  
securities  
for a debt  
assigned.

**XII.** Where an assignor of a debt has collateral securities for the debt, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties. Thus, the assignee of a debt secured by a mortgage will, in Equity, be held entitled to the benefit of the mortgage. (St. § 1047a.) **318.**

**XIII.** Trust  
as to orna-

**XIII.** Equity implied a trust as to orna-

mental timber in favour of the objects of TIT. II.  
CAP. V.  
subsequent limitations. So that a tenant  
for life, or a tenant in fee, with an executory mental  
timber.  
devise over, might be restrained from abusing  
his legal power, by cutting down ornamental  
timber, which is called equitable waste. (2  
Sp. 305 ; *Garth v. Cotton*, 1 Lead. Cas. Eq.  
2nd ed. 559 *et seq.* ; *Turner v. Wright*,  
Johns. 740.) **319.**

By the Judicature Act, 1873 (36 & 37  
Vict. c. 66), s. 25, (3) it is enacted that "an  
estate for life without impeachment of waste  
shall not confer or be deemed to have con-  
ferred upon the tenant for life any legal right  
to commit waste of the description known as  
equitable waste, unless an intention to con-  
fer such right shall expressly appear by the  
instrument creating such estate." **319a.**

XIV. An implied trust arises in favour of XIV. Trust  
of wife's  
mortgaged  
property.  
the wife when she joins with the husband in  
effecting a mortgage upon her property, and  
there is no recital and no special circum-  
stances to show that her interest was in-  
tended to be changed beyond the creation  
of an incumbrance, and yet the equity of  
redemption is reserved to the husband. (2  
Sp. 306 ; *Earl of Huntingdon v. Countess of  
Huntingdon*, 2 Lead. Cas. Eq. 2nd ed. 838,  
*et seq.*) **320.**

## CHAPTER VI.

### OF CONSTRUCTIVE TRUSTS.

**TIT. II.**  
**CAP. VI.**

Implied and  
constructive  
trusts often  
confounded.

**IMPLIED** trusts and constructive trusts, as already observed, are frequently confounded or classed together; and the same trusts are sometimes designated by the name of implied trusts, and at other times by that of constructive trusts. (1 Sp. 509, note (a).) **321.**

Definition of  
a construc-  
tive trust.

But a constructive trust, as distinguished both from express and from implied trusts, may be defined to be a trust which is raised by construction of Equity, in order to satisfy the demands of justice, without reference to any presumable intention of the parties. (See St. § 1195, 1254; 1 Sp. 509.) **322.**

I. Repairs or  
improve-  
ments.

I. A constructive trust may arise where a person who is only joint owner, acting *bond fide*, permanently benefits an estate by repairs or improvements; for, a lien or a trust may arise in his favour, in respect of the sum he has expended in such repairs or im-

provements. So, where a person lawfully in possession under a defective title has made permanent improvements, if relief is asked in Equity by the true owner, he will be compelled to allow for such improvements; for, he who seeks for Equity must do Equity. (St. § 1234-7; 2 Sp. 206; 2 Lead. Cas. Eq. 2nd ed. 520; *Kay v. Johnston*, 21 Beav. 536.) But if a tenant for life thinks fit, of his own discretion, or with the consent of trustees, to expend money in improvements, he is not entitled to have the money repaid out of the corpus; so that if he becomes the purchaser of the property, he will not be entitled to a deduction from the purchase-money in respect of the improvements. (*Dixon v. Peacock*, 3 Drew. 288, 292.) **323.**

II. So, where executors, by mistake, but *bond fide* and without fault, have paid legatees or distributees before a due discharge of all the debts, the latter are treated as trustees for the purpose of paying the debts; because they are not entitled to anything except the surplus of the assets, after all the debts are paid. (St. § 1251; 2 Sp. 297.) **324.**

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CAP. VI.

II. Payment  
of legatees  
or distribu-  
tees before  
creditors.

III. Where a person is under a covenant or agreement, for valuable consideration, to

III. Cove-  
nant or  
agreement  
to convey,

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CAP. VI.

transfer, or  
pay money  
or other  
property.

convey, transfer, or pay money or other property to or for the use or benefit of another, a constructive trust arises in favour of the latter against the former and his representatives, and those claiming under him as volunteers or with notice of the covenant or agreement; because, where things are covenanted or agreed to be done, Equity treats them, for many purposes, as if they were done. (See St. § 1212, 1231.) **325.**

Hence, where the Court is satisfied by parol evidence that a marriage took place on the faith of representations as to a settlement, it will direct a settlement in accordance with those representations, as against the person making them or his devisees. (*Prole v. Soady*, 2 Giff. 1.) **326.**

Nature of,  
and reasons  
for, the  
vendor's  
lien.

And so a constructive trust arises when the purchase-money of an estate is not paid. In such case the vendor has a lien on the property in Equity; that is, a hold upon it for the satisfaction of the purchase-money; and to the extent of the lien, the purchaser becomes a trustee for the vendor. (See St. § 1215, 1217-1220; *Mackreth v. Symmons*, 1 Lead. Cas. Eq. 2nd ed. 235 *et seq.*) And although, in some cases, it is reasonable to presume a tacit consent or agreement that the vendor should have such a lien, yet the

lien is not strictly attributable to such a consent or agreement, but is founded on the most obvious principles of natural justice. (See St. § 1219, 1220.) **327.**

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CAP. VI.

In general, the vendor has such a lien ; and the burden of proof is on the purchaser, <sup>Where it originally exists.</sup> to establish that in the particular case it has been intentionally displaced or waived by the consent of the vendor. (St. § 1224.) Though, on the face of the conveyance, the consideration is expressed to be paid, and even if a receipt is indorsed on the back of the conveyance, and yet the money has not actually been paid, the vendor has a lien. (St. § 1225.) And if a security has been taken for the money, the burden of the proof has been adjudged to lie on the purchaser, to show that the vendor agreed to rets on the security and to discharge the land ; or, at most, the taking of a security has been deemed to be no more than a presumption, under some circumstances, of an intentional waiver of the lien, and not as conclusive of the waiver. (St. § 1226.) **328.**

Where the vendor has a lien against the vendee, it continues, notwithstanding any <sup>Continuance thereof</sup> devolution or transfer of the estate, except where it is extinguished by the countervail-



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CAP. VI.

Against  
whom it  
exists.

ing Equity of a *bond fide* purchaser for valuable consideration without notice, when clothed with the legal title. **329.**

So that it exists against the vendee and his heir, and against volunteers claiming under him; against purchasers under him, with notice that he had not paid the purchase-money; against purchasers even without notice, having an equitable title only; against assignees claiming by a general assignment under the bankrupt and insolvent laws; against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors; and against a judgment creditor of the vendee, at least before an actual conveyance of the estate has been made to him. (See St. § 1228.) For, in each of these cases (except that of the *bond fide* purchaser for valuable consideration without notice, who has only an equitable title), the party in possession has obviously no more equity against the lien of the vendor than the vendee himself had, but clearly stands in the same situation and subject to the same equity. And although the *bond fide* purchaser without notice, who has only an equitable title, has an equity quite distinct from that of his vendor, the first vendee, yet the equity of such purchaser to

retain what he has paid for is only equal to that of the first vendor to be paid for that which he has parted with ; and when the equities are equal, and neither of the parties has the support of the legal title, the maxim applies, *Qui prior est tempore, potior est jure.* **330.** TIT. II.  
CAP. VI.

But the lien will not prevail against a *bond fide* purchaser for valuable consideration from the vendee, where such purchaser has paid his purchase-money, and taken a conveyance of the legal estate, and had no notice, at the time of paying his money, that such vendee had not paid the purchase-money (St. § 1228, 1229); because, having given a valuable consideration for the estate, without notice, he has as much equity to retain what he has so paid for as the original vendor has to be paid for that which he has parted with ; and, having this equal equity, the Court will not take from him the legal title with which he has clothed himself, but will act upon the maxim, that where the equities are equal, the law shall prevail ; so that in this case the vendor's lien is virtually extinguished by the countervailing equity of the purchaser from the vendee. But where a vendee has sold the estate to a *bond fide* purchaser without notice, if the

TIT. II.  
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sub-purchase-money has not been paid, the original vendor may proceed against the estate for his lien, or against the sub-purchase-money in the hands of such purchaser. (St. § 1232.) **331.**

Where the vendee has sold only a part of it, the part retained by him is primarily chargeable with the lien. Where he has sold different parts to different persons, the lien is to be borne rateably between them. (St. § 1233a.) **332.**

IV. Property acquired, or profits made by persons in a fiduciary relation.

IV. If a trustee, or other person standing in a fiduciary relation, acquires property or makes a profit by means of transactions within the scope of his agency or authority, or if a person employs another's property in any trade or speculation, there will be a constructive trust, as to the property so acquired or the profits so made, for the benefit of the *cestui que trust*, principal, owner, or other party standing in the opposite relation. (See St. § 1211, 1211a, 1261; 1 Sp. 512; 2 Sp. 208, 299, 300; *Fox v. Mackreth*, 1 Lead. Cas. Eq. 2nd ed. 92 *et seq.*; *Robinson v. Pett*, 2 Lead. Cas. Eq. 2nd ed. 206 *et seq.*) So that, if a trustee should purchase a lien or mortgage on a trust estate at a discount, he would not be allowed the benefit of the difference, but the purchase would be a trust for the *cestui*

*que trust*. So if a trustee or a partner should renew a lease of the trust or partnership estate, he would be a trustee of such renewed interest for his *cestui que trust* or co-partner, even though the lessor may have refused to grant a renewal to the *cestui que trust* or co-partner. (St. § 2211; 1 Sp. 512; 2 Sp. 208, 299, 300; *Keech v. Sandford*, 1 Lead. Cas. Eq. 2nd ed. 36 *et seq.*; *Clegg v. Edmondson*, 8 D. M. & G. 787.) So if an agent, who is employed to purchase for another, purchases in his own name or on his own account, he will be held to be a trustee for the principal, at the option of the latter. (St. § 1211 a.) And the same principle applies as between a company and one of the directors. (*Liquidators of the Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189.) **333.**

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V. Upon analogous principles, if a mortgagee, or a person having a limited interest in leasehold property, renews the term on his own account, he will be held to be a trustee for all the persons interested in the old lease. (1 Sp. 512; 2 Sp. 299, 302, 303.) **334.**

V. Renewal  
of lease by  
a person  
having a  
limited  
interest.

The person so converted into a trustee of a renewed lease is entitled to the costs and expenses of renewal, with interest, and to compensation for repairing, building, and

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CAP. VI.

lasting improvement; and he may retain the renewed lease to secure the payment. (2 Sp. 304.) **335.**

VI. Wrong-  
ful conver-  
sion or  
alienation  
of trust  
property.

VI. In general, whenever property of one kind has been wrongfully converted into property of another kind, by a trustee or agent, the right *in rem* of the principal or *cestui que trust* ceases, if the means of ascertainment fail; which of course is the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description. But if the property which has been so substituted can be ascertained to be such, it will be liable to the rights of the *cestui que trust* or principal to which the property converted was subject. (See St. § 1158, 1259, 1260; 2 Sp. 303; *Robinson v. Pett*, 2 Lead. Cas. Eq. 2nd ed. 206 *et seq.*) **336.**

But in cases of this sort, the *cestui que trust* or beneficiary is not at all bound by the act of the other party. He has an option to insist on having that into which the trust property has been converted, or to disclaim any title thereto, and resort to any other remedy to which he is entitled, either *in rem* or *in personam*. (St. § 1262.) But he cannot insist on repugnant claims: so that, in the case of a sale of stock by a trustee or

executor, in violation of his trust, the party beneficially entitled may either oblige the trustee or executor to replace the stock, or he may affirm his conduct and take the sum at which he has sold it, with interest and any further profits he may have made by the sale; but the party beneficially entitled cannot insist on having the stock replaced, and having the interest instead of the dividends, or on taking the money, and having the dividends as if the stock had remained. (St. § 1263.) **337.**

If, however, the trustee conveys the trust property to a *bond fide* purchaser for valuable consideration, who has paid his purchase-money, and had no notice of the trust at the time of paying the same, the trust is extinguished. But if the trustee should afterwards re-purchase or otherwise become entitled to the same property, the trust would be revived by construction of Equity. (See St. § 1264, and note; 2 Sp. 40, 195, 196; *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 2nd ed. 1 *et seq.*) And if a trustee conveys or assigns the trust property for valuable consideration, in violation of the trust, to a person who is aware of that circumstance, or conveys or assigns it without valuable consideration, even to a person who has no

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notice, such person will be treated as a trustee for the *cestui que trust*. And an executor is deemed a trustee of the assets of his testator. (St. § 1257; 1 Sp. 512; 2 Sp. 40, 195, 298.) **338.**

VII. Trust  
of mort-  
gaged estate.

VII. Where a person has a mortgage in fee which he has not foreclosed, the legal estate in the mortgaged premises descends to his heir; but by construction of Equity he is trustee for the personal representatives, and through them for the persons entitled to the personal estate of the mortgagee. (2 Sp. 296; *Thornborough v. Baker*, 2 Lead. Cas. Eq. 2nd ed. 857 *et seq.*) **339.**

VIII. Debt  
due from  
executor.

VIII. When a debt is due from an executor, he is converted into a trustee of the debt for the parties interested in the estate. (2 Sp. 296.) **340.**

## CHAPTER VII.

### OF TRUSTEES AND OTHERS STANDING IN A FIDUCIARY RELATION.

I. ALL persons who are natural-born British subjects (*a*), excepting persons attainted, but not excepting *femes covert* and infants, may be trustees. (2 Sp. 32.) And the Supreme Court will appoint a *feme sole* to be a trustee. (*In re Campbell's Trusts*, 31 Beav. 176.) **341.**

TIT. II.  
CAP. VII.

I. Who may  
be trustees.

II. If a person who is appointed executor proves the will, he becomes liable for the performance of the duties of the office; and if he is also appointed trustee, the taking probate is an acceptance of the entire trust. (2 Sp. 918.) **342.**

II. Acceptance of  
office.

III. If a man appoints a trustee of real or personal estate, without naming his heir or personal representative, the heir or personal

III. Devolution or  
delegation  
of a trust.

(*a*) As to aliens, see Smith's Compendium of the Law of Real and Personal Property, 5th ed. page 1244 *et seq.*



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**CAP. VII.**

representative does not become a trustee, although the property may vest in such heir or representative. And where two or more persons and the survivor and the heirs of the survivor are appointed trustees, and the word "assigns" is not introduced, the sole or surviving trustee cannot delegate the trust either by act *inter vivos* or by devise. (2 Sp. 38.) A trustee cannot, without the consent of his *cestui que trust* or of the Court, denude himself of the character of trustee, till he has performed the trust. If, without such consent, he assigns the trust or delegates the performance of its duties to a stranger, he will be answerable for the breaches of trust committed by the assignee or stranger. (2 Sp. 920.) **343.**

IV. Equity  
never wants  
a trustee.

IV. It is a rule in Equity, which admits of no exception, that where a trust exists, a Court of Equity never wants a trustee. For wherever a perfect trust, as opposed to a trust resting in contract or in *fieri*, or even an imperfect trust, if supported by a valuable consideration, has once attached, whether it is an express, an implied, or a constructive trust, and it is not extinguished by the countervailing equity of a *bond fide* purchaser for valuable consideration without notice or other person having a conflicting

equity, nor has otherwise ceased to subsist, TIT. II.  
CAP. VII. Equity will follow the legal estate, and decree the person in whom it is vested to execute the trust. (See St. § 976, 1159, 1162; 1 Sp. 501; 2 Sp. 51, 52, 369, 875, 876.) And the lapse of the legal estate never has the least influence on the trusts to which it is subject: if the individuals named fail, whether by death, incapacity, or refusal, the Court will provide a trustee; if no trustees are appointed at all, the Court assumes the office in the first instance. (2 Sp. 876.) **344.**

V. Trustees, executors, directors of private companies, and other persons standing in a similar situation, are not allowed, even with the consent of their co-trustees, co-executors, or co-adjutors, and, however extraordinary the services they may have rendered, to take any remuneration by way of commission, or brokerage, or salary, without some express or implied provision for that purpose in the instrument under which they claim. (St. § 466a, 1268; 2 Sp. 945, 946; *Barrett v. Hartley*, L. R. 2 Eq. 789.) And a solicitor, who is a trustee, is not entitled to charge for business done by him in relation to the trust, as distinguished from costs out of pocket, although employed to do it by his co-trustee, V. No remuneration allowed.

TIT. II.  
CAP. VII.

unless there is a provision in the deed or will creating the trust, enabling him to receive remuneration for the transaction of such business. (*Robinson v. Pett*, 2 Lead. Cas. Eq. 2nd ed. 206 *et seq.*; *Broughton v. Broughton*, 2 Sm. & Gif. 422; 5 D. M. & G. 160.) And even where there is a provision that a solicitor is to be at liberty to charge for his professional services, he is only entitled to charge for services strictly professional, and not for matters which an executor or trustee ought to have done without the intervention of a solicitor; such as for attendances to pay premiums on policies, to make transfers at the bank, attendances on proctors, auctioneers, legatees, and creditors. (*Harbin v. Darby* (No. 1), 28 Beav. 325.) But trustees are entitled, without any express provision, to defray out of the trust funds expenses legitimately and properly incurred (a). (2 Sp. 938.) **345.**

Expenses  
allowed.

VI. What  
care and  
diligence  
they are  
bound to  
use.

*Prima facie*  
view of the  
decisions on  
the subject.

VI. By analogy to the case of a gratuitous bailee, a trustee would seem to be liable only for gross negligence. (St. § 1268.) **346.**

On the other hand, it may appear that in practice Courts of Equity have in many

(a) The stat. 22 & 23 Vict. c. 35, s. 31, provides that the trust instrument shall be deemed to contain a clause as to reimbursement.

cases required extreme circumspection and vigilance, while, in others, they have been satisfied with the degree of care usually exhibited by men in the management of their own affairs. (St. § 1272, 1273 ; 2 Sp. 917.)

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CAP. VII.**

### 347.

But the true state of the case seems to be this : that there are certain things which either clearly appear in themselves to be duties or are established as such by the uniform policy of Courts of Equity ; and to these the Courts require a rigid adherence. But in regard to other points the trustee is only required to use customary care and diligence ; that which is usually exercised by men of ordinary prudence and vigilance in the management of their own affairs. (See *Brice v. Stokes*, 2 Lead. Cas. Eq. 2nd ed. 725 *et seq.*)

True state  
of the case.

### 348.

Thus, if a trustee omits to sell property when it ought to be sold, and it is afterwards lost, although without any fault of his, he is liable ; because the loss, although not directly occasioned by his default, would never have happened had he not failed in performing what must have appeared a palpable, although perhaps not an urgent, duty. (See St. § 1269, note ; 2 Sp. 934.)

Omission  
to sell

### 349.

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CAP. VII.

Invest-  
ments.

Again, Courts of Equity are in the habit of directing property in their own possession to be invested in the 3*l.* per Cent. Annuities; and it became an established duty, on the part of trustees, to whom no discretion as to investments was given, to invest their trust moneys in those funds. And this rule, like an Act of Parliament, or any other kind of Law, was supposed to be well known, and no one was allowed to plead ignorance of it. If, therefore, a trustee invests, or even suffers money previously invested to remain, on unauthorized security, however unexceptionable it might seem to be, and such security afterwards fails, or if he permits choses in action to remain outstanding, and a loss arises, he will be liable; as also he will for the fluctuations of any unauthorized fund. (See St. § 1269, note, 1273, 1274, note; 2 Sp. 923; 926, 934.) 3*l.* per Cent. Consols is the fund which is usually selected by the Court for investment; but 3*l.* per Cent. Reduced is frequently resorted to for convenience, as when quarterly payments have to be made. (2 Sp. 552, note (a).) **350.**

But where trustees are expressly authorized to invest in Government security, they are not bound to convert other kinds of Government stock into the 3*l.* per Cents.,

and it would seem that they may invest in any kind of Government stock. (*Baud v. Fardell*, 7 D. M. & G. 628.) And by the stat. 22 & 23 Vict. c. 35, s. 32, "when a trustee, executor, or administrator shall not, by some instrument creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor, or administrator, to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper." By the stat. 23 & 24 Vict. c. 38, s. 12, it is enacted that this provision shall operate retrospectively. And by the stat. 30 & 31 Vict. c. 132, s. 1, it is enacted that "the words East India stock in the said Act passed in the session holden in the twenty-second and twenty-third years of her Majesty, chapter thirty-five, shall include and express as well as the East India stock which existed previously to the thirteenth day of August one thousand eight hundred and fifty-nine, when the said Act received the assent of her Majesty, as East India

TIT. II.  
CAP. VII.

**TIT. II.** stock charged on the revenues of India, and  
**CAP. VII.** created under and by virtue of any Act or Acts of Parliament which received her Majesty's assent on or after the thirteenth day of August one thousand eight hundred and fifty-nine; and it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in the stock created by the last-mentioned Act or Acts to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India stock which existed previously to the thirteenth day of August one thousand eight hundred and fifty-nine." And by s. 2, "it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in any securities the interest of which is or shall be guaranteed by Parliament to the same extent and in the same manner as he may invest such trust fund in such securities as aforesaid" (a). **351.**

According to the general understanding of the profession, and the general practice of the Court, where trustees are authorized

(a) See also ss. 10, 11, of 23 & 24 Vict. c. 38, as to investments authorized by general orders. See also 23 & 24 Vict. c. 145, and 34 Vict. c. 27, as to investments.

to invest on mortgage of real estate, they are not justified in advancing more than two-thirds of the value of agricultural freeholds, or one-half of the value of freehold houses; and if the value depends upon fortuitous circumstances—for instance, if the property consists of a mill; or factory, or house situate in a watering-place, or the like—the trustees run the risk of having the mortgage thrown upon themselves, and of being made answerable for the money advanced. (2 Sp. 925; Remarks of Sir J. Romilly, M.R., in *Macleod v. Annesley*, 16 Beav. 605; *Budge v. Gummow*, L. R. 7 Ch. Ap. 719.) And an authority to lend on such personal security as they shall think sufficient will not justify the trustees in lending it to the husband who is in trade, or indeed to a trading concern. (2 Sp. 926.) And an indemnity clause, declaring they shall not be liable for the insufficiency of any security, will not exonerate them from liability if they lend on palpably inadequate security. (*Drosier v. Brereton*, 15 Beav. 221.) **352.**

A trustee is not authorized to sell out stock, and invest the proceeds on a mortgage to secure the retransfer of such stock, and the payment of interest equal to the amount of

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TIT. II. the dividends. (*Whitney v. Smith*, L. R. 4  
CAP. VII. Ch. Ap. 513.) **353.**

Trustees are bound to invest on securities of a permanent nature. So that even where trustees have power to invest as they think fit, they may not invest upon securities which at the time are commanding a higher rate of interest in consequence of their being determinable. (*Stewart v. Sanderson*, L. R. 10 Eq. 26.) **354.**

Omission of trustee or executor to see that the property is duly secured or applied.

An executor will not be liable for money allowed to remain with bankers who fail where it is not an unreasonable sum for executors to keep in the bank (*Swinfen v. Swinfen* (No. 5), 29 Beav. 211), or where it was only reasonable for the money to be deposited there under the circumstances (*Fenwick v. Clarke*, 4 D. F. & J. 240). But he will be liable if he places his money in the hands of a banker by way of investment, notwithstanding an indemnity clause against loss by a banker of money deposited for safe custody. (*Rehden v. Wesley*, 29 Beav. 213.) **355.**

Again, where there are two or more trustees or executors, it is the duty of each trustee and executor to see that the property is duly secured or rightly applied, as the case may be. And therefore, as a general rule,

if by the act, direction, agreement, or consent of one of them, the trust fund is paid over to the other, even though it was so paid over in order to be applied by the receiver for those purposes for which it was properly applicable, and the receiver wastes or misapplies it, each will be answerable for the whole; except in the case of money remitted to a co-trustee or co-executor, to be paid by him in his neighbourhood, where the trustee or executor remitting the same, in case it had been his own money, would naturally have remitted it to some one to pay it away, instead of undertaking a journey for the purpose of paying it himself. (St. § 110 a, 1281, note, and 1284, and note; 2 Sp. 370, n., 920, 934; *Cowell v. Gutcombe*, 27 Beav. 568.) And so if one trustee is allowed to retain the money, and he, against the remonstrances of the others, places it in the hands of solicitors to invest on mortgage, and the solicitors apply it to their own uses, the others will be liable. (*Griffiths v. Porter*, 25 Beav. 236.) So, if one trustee improperly suffers the other to detain the trust money a long time in his own hands, without security, or lends it to the other, or joins or acquiesces in a loan of it to any one else, on insufficient security, each will be liable for the whole

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loss which may happen. And so if it is mutually agreed between them, that one shall have the exclusive management of one part of the trust property, and the other trustee of the other part, each will be liable for any loss which may happen, even to the part of which the other has the management (St. § 1274, 1284; 2 Sp. 920, 922, 923, 932; *Mendes v. Guedalla*, 2 Johns. & H. 259); because the party not acting was in default for giving the other the power, and exposing him to the temptation, to commit a breach of trust, instead of exercising that control over the property which it was his duty to exercise for the protection and due management thereof. **356.**

Losses without want of customary care or diligence.

On the other hand, if a trustee or other person standing in a fiduciary relation has not failed in doing what must have appeared to be a palpable duty, and has invested the property on authorized security, he will not be answerable for losses which happen without any want of customary care or diligence on his part. (See St. § 1269, note, 1274, note, and 465; 2 Sp. 937.) So that if he deposits the money with a banker in good credit, to be remitted to the proper person by a bill drawn by a person in due credit, and the banker or drawer of the bill becomes bank-

rupt, he will not be responsible. The rule in all cases of this sort is, that where a trustee or executor acts by other hands, either from necessity, or conformably to the common usage of mankind, he is not to be made answerable for losses. (St. § 1269; 2 Sp. 933-5; *In re Bird, Oriental Commercial Bank v. Savin*, L. R. 16 Eq. 203.) But it has been held that trustees who pay over the trust funds to a wrong party on a forged certificate are liable (*Eaves v. Hickson*, 30 Beav. 136); and that a trustee or executor is liable for loss caused by the fraud, negligence, or other fault of his solicitor, although in employing such solicitor he may have exercised ordinary care and discretion. (*Bostock v. Floyer*, L. R. 1 Eq. 26; *Hopgood v. Parkin*, L. R. 11 Eq. 74; *Sutton v. Wilders*, L. R. 12 Eq. 373.) But the contrary was held in another case. (*In re Bird, Oriental Commercial Bank v. Savin*, L. R. 16 Eq. 203.) And where a trustee employs a proper person to do a necessary act, and that person is the cause of an accident (as by felling a tree) for which the trustee is made to pay, the loss ought to be borne by the estate, and not by the trustee. (*Benett v. Wyndham*, 4 D. F. & J. 259.) **357.**

VII. If trustees do not invest trust money VII. Non-investment.

L 2

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when they ought to do so, even though they may make no profit by it, they are responsible, at the option of the *cestui que trust*, either for the money, and interest at 4l. per cent., or the stock which might have been purchased therewith at the time when the investment ought to have been made, and the dividends. (St. § 1273 a; 2 Sp. 924; *Att.-Gen. v. Alford*, 4 D. M. & G. 843.)  
**358.**

**VIII.** Ter-  
minable  
or rever-  
sionary  
property.

VIII. As a general rule, where a testator subjects the residue of his personal estate to succeeding limitations, directly or by way of trust, without any particular directions as to the investment or mode of enjoyment, or even with an authority to his trustees to allow the same state of investment to continue; there, in the absence of indications of a contrary intention, such part of the residue as may be wearing out (such as leaseholds), or may be invested in securities which yield a high rate of interest, but are not authorized by the Court, must be converted and put in such a state of investment as to be securely available for all persons interested in it. And if the residue comprises property of a reversionary nature, that also must be converted. The one rule protects the remainder-man, the other pro-

fects the tenant for life. (See 2 Sp. 42, TIT. II. CAP. VII. 552-7; *Howe v. Earl of Dartmouth*, 2 Lead. Cas. Eq. 2nd ed. 262 *et seq.*; *Bate v. Hooper*, 5 D. M. & G. 338; *Boys v. Boys*, 28 Beav. 436; *Rowe v. Rowe*, 29 Beav. 276; *Brown v. Gellatly*, L. R. 2 Ch. Ap. 751; *Porter v. Baddeley*, L. R. 5 Ch. D. 542; and other cases cited in Smith's Law of Prop. 5th ed. par. 3421; *Macdonald v. Irvine*, L. R. 8 Ch. D. 101.) **359.**

IX. Where personalty is directed to be converted as soon as conveniently may be, there, as between the executors and the persons interested in the estate, the personalty is to be considered as converted within a year; that being considered as the time within which, in the generality of cases, it may be converted with ordinary diligence. (2 Sp. 42, 565, note (c).) **360.**

X. When a sum of stock is given to trustees in trust for a married woman for life, with remainder to her children, being infants, the Court will not ordinarily give its sanction to the fund being sold out and invested on mortgage, so as to give the tenant for life a greater income, though power may have been given to the trustees to lay out the property on real security, and

**TIT. II.** though they join in the petition. (2 Sp.  
**CAP. VII.** 569.) **361.**

**XI.** Equity  
 guards  
 against a  
 breach of  
 trust.

**XI.** It is the wise policy of Courts of Equity to guard against a breach of trust, by prohibiting all acts which may unnecessarily place the trustee in a situation of temptation. (See 2 Sp. 300.) **362.**

Trustee may  
 not mix the  
 trust money  
 with his  
 own.

Hence, in all cases in which a trustee keeps trust money in his hands, or in the hands of a banker, he should take care to keep it separate from his own. For, if he were to mix it with his own in a common account, he would be deemed to have treated the whole as his own, and would be charged with interest, and would be liable to the *cestui que trust* for any loss sustained by the banker's insolvency. (St. § 1270 ; 2 Sp. 934. See *Cook v. Addison*, L. R. 7 Eq. 466.) If the trustee were at liberty to mix the trust money with his own, he would often be tempted to use it as his own, fully intending shortly to replace it: and frequently, indeed, he would not know whether the money with which he was carrying on his affairs was his own or not. In this way, he would be naturally led to expend the trust money on his own account, and loss to the trust property would frequently be occasioned. **363.**

Similar observations may be made with respect to an agent. (St. § 468.) **364.** TIT. II.  
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XII. Upon the same principle, a trustee, or other person standing in a fiduciary relation, is never permitted to make any profit to himself from the property with which he is entrusted or from the office itself: if any advantage is gained by such a person, it belongs to the *cestui que trust*. Hence he is accountable for all the interest which he ought to have made, and would have made, by the investment of the property on the security directed by the instrument creating the trust, or, in the absence of any such direction as to the mode of investment, on the security authorized by the general rule of the Court. And he will also be accountable for any interest and gains beyond the amount of such interest as above mentioned, which he has actually made on, or with, or in regard to, the trust property, whether in the ordinary discharge of his duty, or in transactions entered into for his own benefit, as he supposed, or otherwise, if the amount of such extra interest and gains can be ascertained. (See *supra*, par. 333, and St. § 465, 1211, 1261, 1269, note, 1277, 1278; 2 Sp. 300, 945; *Sugden v. Crossland*, 3 Sm. & G. 192; *Crosskill v. Bower*, 32 Beav. 86;

XII. Trustee is accountable for interest and gains.



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CAP. VII.

*Chaplin v. Young* (No. 2), 33 Beav. 414.)

Or he will be made to pay interest at the rate of 4*l.* or 5*l.* per cent. (2 Sp. 921.) And, under extraordinary circumstances, the Court will direct annual or half-yearly rests to be made, so as to give the *cestui que trust* the benefit of compound interest: as, if a trustee, in manifest violation of his trust, has applied the trust fund to his own benefit and profit in trade, or has conducted himself fraudulently, or has wilfully refused to follow the positive directions of the instrument creating the trust, as to the investment of the property. (St. § 1277; 2 Sp. 921.) And if a trustee or particular agent purchases from his *cestui que trust*, even at a public auction, the *cestui que trust* has the option of taking to or repudiating the transaction; unless the *cestui que trust* intended that the trustee should buy, and there has been no fraud, concealment, or advantage taken on the part of the trustee. (2 Sp. 300, 301, 943, 944; *supra*, par. 161; *Luff v. Lord*, 34 Beav. 220.) A person may indeed grant a beneficial interest, or make a present, to his trustee, agent, or receiver; but the latter must show that the dealing was fair, and that the grantor was perfectly free in the matter, and had the same knowledge as he

himself had. (2 Sp. 301, 944; *Barrett v. Hartley*, L. R. 2 Eq. 789.) **365.** TIT. II.  
CAP. VII.

XIII. A trustee (as in certain cases we have noticed, par. 356) is responsible for his own acts and defaults, and for those wrongful acts and defaults of his co-trustees to which he is privy, and in which, though without any corrupt motive, he expressly, tacitly, or virtually acquiesces, or which would not have happened but for his own act or default. Thus, if two trustees have properly sold out trust moneys, and one of them hands the cheque for the proceeds to the other, who misapplies the money, they are both liable. (*Trutch v. Lamprell*, 20 Beav. 116; *Horton v. Brocklehurst* (No. 2), 29 Beav. 504.) And so if two trustees execute a release for trust money, which is then received by one and invested by him on improper security, the other is liable: for it was his duty to see that it was properly invested. (*Thompson v. Finch*, 22 Beav. 316.) And where two trustees, who were directed to invest on mortgage or in stock, retained money in a bank, and one died, and the other applied it to his own use, it was held that the estate of the former was liable, though the other might have sold out stock on the death of his co-trustee. (*Gibbins v.*

XIII. Responsibility for each other's acts and defaults.

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CAP. VII.

*Taylor*, 22 Beav. 344.) And the same rule applies to executors and other persons standing in a fiduciary relation. But trustees and others standing in a fiduciary relation are not otherwise responsible for the acts or defaults of each other. (2 Sp. 918, 928.)  
**366.**

Distinction  
between  
trustees and  
executors in  
regard to  
the effect of  
joining in  
receipts.

There is, however, an important distinction in connexion with this point, between the case of mere executors, and the case of trustees; which, nevertheless, does not militate against the application of the above-stated rule both to trustees and executors, but is founded in the different power with which they are legally invested, and amounts only to this: that a particular circumstance which would afford a presumption of the performance of an act involving responsibility, in the case of an executor, will not afford any presumption thereof in a case of a trustee. Thus, trustees have only a joint interest, power, and authority, and must all join both in conveyances and receipts (*Lee v. Sankey*, L. R. 15 Eq. 204); and yet it would be impracticable in some cases, and expensive and inconvenient in others, to require that all should together actually receive the trust money from the person by whom the same may be payable. Hence,

it cannot be inferred from a trustee joining in a receipt, that he has received any part of the money. But where there are co-executors, each has a several right to receive the debts due to the estate, and all other assets, and is competent to give a valid discharge by his own separate receipt; and, therefore, if they join in a receipt, it is purely a voluntary act, and it will be presumed that they jointly received the money.

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### 367.

In each case, however, the same rule applies as to responsibility for money received; although, in the one case, the party, being a trustee, is not presumed to have done the act which would make him responsible, namely, the act of receiving the money; because the act done by him is as likely to have been a mere formal act, as not: whereas in the other case, the party, being an executor, is presumed to have done the act involving responsibility; because he has done that which an executor, who has not actually received the money, is not called upon to do. (As to these passages respecting acts and defaults for which a trustee or other person standing in a fiduciary relation is responsible, see St. § 1280, 1280 a, and note; 2 Sp. 928, 929, 932; *Brice v. Stokes*,

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2 Lead. Cas. Eq. 2nd ed. 725 *et seq.*)  
**368.**

Trustee  
indemnity  
clause.

The trustee indemnity clause does not exonerate a trustee from the consequences of a breach of trust. (*Brumridge v. Brumridge*, 27 Beav. 5.) Its insertion leads many, in ignorance of this, to accept a trust, and many others to be so remiss as to give their co-trustees the opportunity of committing breaches of trust, whereby such trustees are involved in Equity proceedings, which, however, often necessarily prove unavailing to remedy the loss occasioned to the *cestuis que trust* (a). **369.**

XIV. Breach  
of trust by  
an executor.

XIV. "Every person who acquires personal assets by a breach of trust or a *devastavit* by an executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying, or receiving as a pledge for money advanced to the executor at the time, any part of the personal assets, even knowing them to be such, whether specifically given by the will or otherwise; because the sale or pledge is held to be

(a) The stat. 22 & 23 Vict. c. 35, s. 31, provides that trust instruments shall be deemed to contain these clauses.

*primâ facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledging is *primâ facie* inconsistent with the duty of an executor." (*Per* Sir John Leach, in *Keane v. Robarts*, 4 Mad. 357, cited St. § 580; see also 2 Sp. 373, 374, 379.) And if an executor or administrator disposes of assets without a valuable consideration, the assets may be followed in specie, if distinguishable; but if the property so transferred is money and not distinguishable, and the person taking it knew it to be part of a testator's or intestate's estate, the creditors, legatees, or next of kin, have a personal demand, to the amount of the assets so disposed of. (2 Sp. 379.) **370.**

XV. Where executors or trustees are jointly implicated in a breach of trust, all of them should, if possible, be brought before the Court, and should be made to contribute proportionably; especially where the trust property is to be brought back to be administered by the trustees, or where a general administration is involved. (See observa-

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XV. Joint  
breach of  
trust.

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tions of L. C. B. Richards, *In re Chertsey Market*, 6 Price, 278; *Perry v. Knott*, 4 Beav. 179; *Munch v. Cockerell*, 8 Sim. 219; *Devaynes v. Robinson*, 24 Beav., note to p. 99. But see, *contra*, *Ex parte Angle*, Barn. 425.) **371.**

But each of the trustees, who are jointly implicated in a breach of trust, is responsible for the entire loss, and liable to make it good (as in certain cases we have already noticed); so that the *cestui que trust* may, in case of need, proceed against any or either of them singly or separately, even against the less guilty. (See *Walker v. Symonds*, 3 Swans. 75-8; *Bradwell v. Catchpole*, id. 78, note. See also Rules of Court, 1875, Ord. xvi. r. 5; and *Attorney-General v. Corporation of Leicester*, 7 Beav. 176; *Kellaway v. Johnson*, 5 Beav. 319; *Perry v. Knott*, 4 Beav. 179; 5 Beav. 293; 2 Sp. 941.) And in such case, the trustee or trustees who may be so singly or separately compelled to make good the loss, may seek contribution from the others or other of them in another suit. (See Lord Eldon's judgment in *Walker v. Symonds*, 3 Swans. 76-8; 2 Sp. 941.) **372.**

XVI. Acquiescence in a breach of trust.

XVI. If *cestui que trust* has for a long time acquiesced in the misconduct of his

trustee, with full knowledge of it, a Court of Equity will not relieve him; for *vigilantibus, non dormientibus, æquitas subvenit*. (St. § 1284 a.) **373.** TIT. II.  
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XVII. The debt created by a breach of trust is only regarded as a simple contract debt, both at Law and in Equity, even where the trust arises under a deed executed by the trustees; unless the trustee who committed such breach of trust has acknowledged the debt under seal (St. § 1285, 1286; 2 Sp. 936); or unless by deed he has not merely accepted the trust, but has agreed or declared that he will execute the trusts. (*Wynch v. Grant*, 2 Drew. 312; *Holland v. Holland*, L. R. 4 Ch. Ap. 449.) **374.** XVII. Debt by breach of trust is a simple contract debt.

Money owing to a defaulting trustee as a beneficiary will be regarded as money paid by him out of money for which he has not accounted. (*Jacubs v. Rylance*, L. R. 17. Eq. 341.) **375.** Default by a trustee who is a beneficiary.

XVIII. A trustee may bind the estate by a conveyance to a *bond fide* purchaser, who had no notice at the time of paying his purchase-money (St. § 1264, and note; *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 2nd ed. 1 *et seq.*): because, in that case, the trust is virtually extinguished by the countervailing equity of the *bond fide* purchaser. But if XVIII. Power of trustee to bind the estate by a sale, &c.



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afterwards the trustee re-purchases or otherwise becomes entitled to the same property, the trust revives and re-attaches upon it. (St. § 1264.) And so, if a trustee or executor transfers trust funds upon the trusts of a settlement made or to be made upon his or her marriage, and the opposite party to the marriage contract had no notice of the fact that the party transferring was not beneficial owner of the funds, it has been held that the trusts of the settlement will attach upon the funds. (*Cooper v. Wormald*, 27 Beav. 266.) **376.**

A purchaser has no right to a conveyance from trustees, where they had no right to sell at all, or not in the way in which they did sell, and where the purchaser was aware of that circumstance before he paid his purchase money. (*Dance v. Goldingham*, L. R. 8 Ch. Ap. 902.) **377.**

The trustee may bind the estate by a *bond fide* mortgage, or other specific lien, without notice of the trust. But the trust property will not be bound by any judgment or any other claim of creditors against the trustee. (St. § 977.) **378.**

If, however, for a great number of years a trust for raising money remains unperformed, and a sale or mortgage is proposed to

be made by the trustees, without an apparent reason for the sale or mortgage, and without the concurrence of the parties who are in possession and receipt of the rents, the purchaser or mortgagee is under some obligation to inquire and see whether the transaction is or is not a breach of trust. (*Stroughill v. Anstey*, 1 D. M. & G. 654.) **379.**

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And if a person, though without any notice of a trust, and for valuable consideration, takes from a trustee a mere equitable estate, interest, or charge, when, for his own safety, he ought to have required a legal estate, interest, or charge, he cannot set it up against the *cestuis que trust*, where the trustee wrongfully created it. (*Shropshire Union Railways, &c. Co. v. The Queen*, L. R. 7 H. L. 496.) **380.**

Where a trustee is beneficially interested in part of a trust fund, and misapplies the other part, his own part is liable to make good the other part. And it has been held that this liability exists even as against an assignee of the trustee's part, who had previously put a *distringas* on it. (*Wilkins v. Sibley*, 4 Gif. 442.) **381.**

XIX. An executor or administrator is per-

(a) See stat. 23 & 24 Vict. c. 145, s. 30, as to powers of paying debts, compromising, compounding, and referring to arbitration.

XIX. Liability, duty, and power of executor or administrator (a).

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sonally liable for the payment of debts in respect and to the extent of the personal assets. It is his primary and paramount duty, with all convenient speed, to pay the debts out of the personal estate. And he has full right either to mortgage or sell for payment of debts. And hence if the assets be sold or aliened by the executors or administrators, or any one of them, for valuable consideration, the creditors cannot follow them : they are absolutely vested in the purchaser. And an executor or administrator may assign to a creditor, and give him a power of attorney to collect debts, to secure the payment of his, the creditor's, own debt. (2 Sp. 372, 373 ; *Earl Vane v. Rigden*, L. R. 5 Ch. Ap. 663.) **382.**

If an executor or administrator has, except under the direction of the Court, or except in the case provided for by the stat. 22 & 23 Vict. c. 35, s. 29, paid away the residue in ignorance of the existence of any debt, he is still liable. (2 Sp. 921.) But an executor or administrator fairly stating the facts, and paying over the assets under the direction of the Court in an administration suit, is fully indemnified against all existing or contingent demands on the estate. (*Waller v. Barrett*, 24 Beav. 413 ; *Bennett*

v. *Lytton*, 2 Johns. & H. 155; *Williams v. Headland*, 4 Gif. 505.) And by the stat. TIT. II.  
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22 & 23 Vict. c. 35, s. 29, "where an executor or administrator shall have given such or the like notices, as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the

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person or persons who may have received the same respectively." And an executor has the same protection under this Act as under a decree. (*Clegg v. Rowland*, L. R. 3 Eq. 368.) **383.**

This Act applies to claims of next of kin as well as to claims of creditors. And it affords protection to the sureties in an administration bond, where the administrator has pursued the course prescribed. (*Newton v. Sherry*, L. R. 1 C. P. D. 246.) **384.**

By the stat. 22 & 23 Vict. c. 35, s. 30, trustees, executors, or administrators may apply, by petition or summons, upon a written statement, for the opinion, advice, or direction of a judge, on any question respecting the management or administration of the trust property, or the assets of any testator or intestate. **385.**

One of two or more executors may settle an account with a person who is accountable to the estate, so as to bind the others and the estate; subject to any question of his liability to the parties beneficially interested for any impropriety of conduct; and subject to this also, that if there is any fraud or gross error in the settlement of account, it may be a ground for re-opening it. (*Smith v. Everett*, 27 Beav. 446, 454.) **386.**

After an administration decree, an executor can do no act to vary the rights of the parties; as by giving an acknowledgment to take a debt out of the Statute of Limitations. (*Phillips v. Beal* (No. 2), 32 Beav. 26.) **387.**

XX. Trustees to support contingent remainders are peculiarly considered as honorary trustees for the benefit of the family, and as entitled to exercise a discretion for that purpose. And hence a Court of Equity, except in special cases, will not order them to join in conveyances which may affect or destroy the remainders. And, on the other hand, in those instances where they have so joined, after the first tenant in tail attained his majority, no judge in Equity has gone the length of holding that he would punish them as for a breach of trust, even in a case where a Court of Equity would not have directed them to join. Where, however, before the first tenant in tail is of age, trustees join in destroying the remainders, they are liable for a breach of trust; and so is every purchaser under them with notice. In some few cases, however, Courts of Equity have compelled such trustees to join in conveyances which may affect or destroy the remainders, under peculiar circumstances of

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XX. Trustees to support contingent remainders.

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pressure, to discharge incumbrances prior to the settlement; or in favour of creditors, where the settlement was voluntary; or for the advantage of persons who were the first objects of the settlement; as, for example, to enable the first son to make a settlement on an advantageous marriage. (St. § 995-7; Lewin on Trusts, 4th ed. 285-292.) **388.**

**XXI.** Equity will aid and direct trustees.

**XXI.** Courts of Equity will assist the trustees, and protect them in the due performance of the trust, whenever they ask the aid and direction of the Court, as to the establishment, the management, or the execution of it. (St. § 961.) And in cases of substantial doubt, it is best to ask for the direction of the Court. (St. § 1276, note.) **389.**

Safety of trustees.

A trustee who commits a plain breach of trust is not protected from its consequences by the circumstance that he honestly took and followed the advice and opinion of his solicitor, whatever remedy he may have against his solicitor (2 Sp. 919), or that he committed it with the view of saving his *cestui que trust* from ruin. (See 2 Sp. 920.) A married woman, who by her entreaties has persuaded a trustee to commit a breach of trust to rescue her husband and family from ruin, has shortly afterwards made the

trustee liable for that breach of trust, by taking Equity proceedings against him! TIT. II.  
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— — —  
(2 Sp. 920.) **390.**

A trustee is not in all cases to be made liable upon the mere ground of his having deviated from the strict letter of his trust; for the deviation may be necessary or beneficial. But when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the Court, that the deviation was necessary or beneficial. (*Harrison v. Randall*, 9 Hare, 407.) **391.**

It is impossible ever to pronounce that a trustee or executor is safe from personal risk, unless he has acted in the execution of the trust under the directions of the Court (2 Sp. 49), or is protected by the stat. 22 & 23 Vict. c. 35, ss. 29, 30 (*supra*, par. 383, 385.) **392.**

A person who accepts the office of trustee, at the request of the *cestui que trust*, is entitled to be indemnified by the latter personally against all loss which may arise in the due execution of the trust. (*Jervis v. Wolferstan*, L. R. 18 Eq. 18.) **392 a.**

Notice to an executor of a possible contingent liability of his testator's estate (such as the possible insolvency of a company



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believed to be perfectly solvent), is not a sufficient reason for rendering it improper for him to distribute the estate without the direction of the Court; and if the liability afterwards becomes a debt, he will be entitled to call on the residuary legatees to refund the capital paid to them, but not the intermediate income (*Jervis v. Wolferstan*, L. R. 18 Eq. 18.) **393.**

**XXII. Muniments of title.**

**XXII.** A trustee is entitled to have the muniments of title, and, in fact, it is his duty to keep them in his possession. (2 Sp. 46.) **394.**

Where there is any difficulty or danger, as regards the title deeds of a trust estate, or the securities of a trust fund, the Court may provide for every such emergency, by ordering the deeds or the securities to be deposited in Court. (2 Sp. 46.) **395.**

**XXIII. Equity will remove trustees, and appoint others.**

**XXIII.** If trustees are guilty of gross negligence, mismanagement, or misconduct, or if, from any cause, there is a failure of trustees qualified and willing to act, new trustees will be substituted by the Court(a). (St. § 1287, 1289.) And if a trustee becomes insolvent, it is a good ground for his removal. (*Harris v. Harris* (No. 1), 29 Beav. 107.)

(a) See stat. 23 & 24 Vict. c. 145, ss. 27, 28.

And the Court has even removed a joint trustee from a trust, on the mere ground that the other trustees would not act with him; because if he were not removed, irreparable mischief might happen to the trust property or the *cestui que trust*. (St. § 1288; 2 Sp. 943.) **396.**

XXIV. In the case of a charitable trust, it seems the Court will direct a power to appoint new trustees prospectively to be inserted in a deed appointing new trustees; but not in the case of a private trust, unless it is authorized by the instrument constituting the trust. (2 Sp. 37.) **397.**

XXV. Before the stat. 1 Vict. c. 26, ss. 30, 31, trustees took the inheritance, in those cases where it was necessary, for the purpose of a trust created by will, that they should take the inheritance. And in the case of a devise to trustees for sale, though only a part of the inheritance was required to be sold, yet the Court considered them as trustees of the whole inheritance. (2 Sp. 295.) **398.**

XXVI. When all the duties of a trustee are at an end, and this is clearly shown to him, and he has no notice of any disposition or incumbrances made by the *cestui que trust*, he must, on demand, convey the legal estate to his *cestui que trust*, at the peril of

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**TIT. II.**  
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paying the costs of proceedings occasioned by his refusal. But in cases of real doubt or difficulty, a trustee, before he parts with his estate, is fully justified in requiring an indemnity from his *cestui que trust*, or in seeking the directions and indemnity of the Court. (2 Sp. 48.) **399.**

**XXVII.**  
Rendering  
and settle-  
ment of  
accounts.

**XXVII.** A trustee is entitled to have his accounts examined, and to have a settlement of them. He is also bound to render proper accounts, if demanded, and to be always ready with them. If the *cestui que trust* is satisfied that nothing more is due to him, he ought to close the account, and give an acknowledgment equivalent to a release, though the trustee cannot oblige the *cestui que trust* to give a release under seal. On the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to require to have the accounts taken. He is bound to adopt one of these two courses : he is not at liberty to keep proceedings hanging for an indefinite time over the head of the trustee. (2 Sp. 46, 47, 921; *Kemp v. Burn*, 4 Gif. 348.) **400.**

Duty of  
rendering  
other infor-  
mation.

A trustee or executor is bound to render every necessary information, and, if he have not all the necessary information, he is bound to seek for it, and, if practicable, to obtain

it (a). (2 Sp. 921 ; *Talbot v. Marshfield*, TIT. II.  
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L. R. 3 Ch. Ap. 622.) **401.**

Executors must be allowed a reasonable time for breaking up a testator's domestic establishment, and discharging his servants. Breaking up  
testator's  
establish-  
ment.  
(*Field v. Peckett* (No. 3), 29 Beav. 576.) **402.**

(a) On the subject of Trusts and Trustees, see stat. 1 Will. IV. c. 60 ; 13 & 14 Vict. c. 60 ; 15 & 16 Vict. c. 55 ; 10 & 11 Vict. c. 96 ; 12 & 13 Vict. c. 74 ; 22 & 23 Vict. c. 35 ; and 23 & 24 Vict. c. 38, s. 145.

## CHAPTER VIII.

### OF THE SPECIFIC PERFORMANCE OF AGREEMENTS AND DUTIES NOT ARISING FROM TRUSTS.

**TIT. II.  
CAP. VIII.**

**I. Remedy  
at Law.**

I. By the Common Law, if a party who ought to perform a contract or covenant, fails to do so, no redress could be had, except in damages. (St. § 714.) **403.**

**II. A specific  
performance  
will be  
decreed in  
Equity,  
where  
damages  
would not  
afford com-  
pensation.**

II. In Equity a specific performance of a contract, covenant, or duty, will be decreed, where damages would not afford an exact compensation for the non-performance thereof, whatever may be the form or character of the instrument containing such contract or covenant, or giving rise to such duty. And hence it will be decreed in all cases of contracts for the purchase of land ; because the local character, vicinage, soil, easements, or accommodations of the land, may give it a peculiar value in the eyes of the purchaser ; so that damages, which would enable the purchaser to buy other land, of the very

same marketable value would not or might not be a complete compensation. And if a bond is entered into, with a penalty, Equity will not regard it as an option to do the act required or pay the penalty, but as an agreement to do the act at all events, of which it will enforce a specific performance. (St. § 715, 717, 718, 739-742, 746, 751, 783-6, 850, 1425.) **404.**

III. But Equity will not interfere where damages at Law would amount to a complete compensation. Hence specific performance of articles of apprenticeship would not be decreed. (*Webb v. England*, 29 Beav. 44; *Crampton v. Varna Railway Co.*, L. R. 7 Ch. Ap. 562; *Wilson v. Northampton, &c., Railway Co.*, L. R. 9 Ch. Ap. 279.) And a performance of a contract for the sale of stock or goods will not be enforced in ordinary cases; because damages at Law, calculated on the market price of the stock or goods, are generally equivalent, in point of value, to the delivery of the stock or goods contracted for; inasmuch as, with the damages, the purchaser may ordinarily buy stock or goods of the same kind and of the same value to himself. But a performance of a contract respecting stock, goods, or personal property, will be enforced where

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III. Not  
where they  
would afford  
a complete  
compensation.

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**CAP. VIII.**

damages at Law could not afford a complete compensation. (St. § 717-720, 746; *Falcke v. Gray*, 4 Drew. 651; *Cuddee v. Rutter*, 1 Lead. Cas. Eq. 2nd ed. 640 *et seq.*; *Dowling v. Betjemann*, 2 Johns. & H. 544.) And where the specific performance of a contract respecting chattels will be decreed on the application of one party, on the ground that damages would not be a complete compensation to him, Equity will entertain the like suit at the instance of the other party, though the relief sought by him is merely in the nature of a compensation in damages or value; for, in all cases of this sort, the Court acts on the ground that the remedy ought to be mutual. (St. § 723.) The same rules apply to agreements respecting personal acts, for the non-performance of which an exact compensation may sometimes be made by way of damages, while in others it cannot. (St. § 722-9.) **405.**

IV. At Law, contracts and covenants are considered merely as personal and executory,

IV. At Law, contracts and covenants to sell, convey, or transfer land or other property, are considered simply as personal and executory contracts and covenants, and not as attaching to the property in any manner as a present or future charge or otherwise. (See St. § 714, 790.) But in Equity, from the time of a contract for the sale of land,

but in Equity, as performed, in regard to

the vendor, and his heirs, and any one claiming as a subsequent purchaser under him, become, as to the land, trustees for the purchaser and his heirs, devisees, or vendees; and the purchaser and (except so far as the case is altered by the stat. 17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34, *infra*, par. 481, 485, 486) his personal representatives become, as to the money, trustees for the vendor and his personal representatives. (St. § 788, 789, 790.) **406.**

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consequences.

A vendor of land may receive the balance of the purchase-money, and convey the estate to the purchaser, without regard to the receipt of a mere notice that the purchaser had agreed to assign the contract. (*McCreight v. Foster*, L. R. 5 Ch. Ap. 604; *S. C. nom. Shaw v. Foster*, 5 H. L. 321.) **407.**

Every payment of purchase-money to the vendor transfers, in Equity, to the purchaser, a corresponding proportion of the estate. And hence, where the purchase-money is to be paid by instalments, and the purchaser has paid some instalments, and then declines to complete, and is absolved from the liability to complete the purchase, owing to the default of the vendor, the purchaser has



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Land  
articled or  
devised to  
be sold, and  
money  
articled or  
bequeathed  
to be in-  
vested in  
land.

a lien on the estate for the money he has so paid, as against the vendor, and every mortgagee of the vendor who simply gives him notice of his mortgage, without attempting to prevent the completion of the contract or the payment of the instalments. (*Rose v. Watson*, 10 H. L. Cas. 672.) **408.**

In like manner, land directed, articted, conveyed, or devised to be sold and turned into money, is reputed as money; and money directed, articted, assigned, or bequeathed to be invested in land, has in Equity many of the qualities of real estate, and in particular is descendible and devisable as such. (St. § 790; *Fletcher v. Ashburner*, 1 Lead. Cas. Eq. 2nd ed. 659 *et seq.*; *Dixie v. Wright*, 32 Beav. 662.) But the person for whose benefit the conversion is to be made may elect to take the property in its unconverted state. And this election he may make as well by acts or declarations clearly indicating a determination to that effect as by an application to a Court of Equity. (St. § 793, 1213.) But where it has vested in two or more persons, one cannot elect without the others or other. (*Holloway v. Radcliffe*, 23 Beav. 163.) **409.**

In general, Courts of Equity do not incline to change the quality of the property as the

testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout a definite and different character. (St. § 1214, 1214 a.) **410.**

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V. Where the specific execution of a contract respecting lands would have been decreed between the parties, it will be decreed between all parties claiming under them in privity of estate, representation, or title, unless other controlling equities have intervened. (St. § 788.) Hence, if the vendor, before completion, dies intestate as to his realty, his legal personal representative may maintain a suit against his heir and the purchaser for a specific performance. (*Hoddel v. Pugh*, 33 Beav. 489.) And, before the stat. 17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34 (*infra*, par. 481, 485, 486), where the heir of the purchaser came into Equity for a specific performance, he might in general require the purchase-money to be paid out of the personal estate of the purchaser in the hands of his personal representatives. (St. § 790.) **411.**

V. Specific performance decreed between persons claiming under the parties.

Purchaser's heir may require the money to be paid out of the personal estate.

VI. If the terms of an agreement, either through negligence or otherwise, have not been complied with in particulars which do

VI. Non-compliance with terms of agreement in non-essen-

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tial parti-  
culars,  
or slight  
misdDescrip-  
tion.

not pertain to the essence of the contract, or if there has been a slight misdescription of the property, Courts of Equity will nevertheless decree a specific performance in favour of the party chargeable with the non-compliance or misdescription, if compensation can be made for an injury that may have been occasioned by the non-compliance or for the misdescription of the property. (See St. § 747, 748, 771, 775-777, and notes; *Seton v. Slade*, 2 Lead. Cas. Eq. 2nd ed. 429 *et seq.*) **412.**

At Law, time was of the essence of the contract. But in Equity it is held to be of the essence of the contract only in cases of direct stipulation that it shall be so considered, or where it is obviously so from the nature of the case; as where a reversion is sold, or where the property sold is required for some immediate purpose, as trade or manufacture, or is in its nature of a fluctuating value, or is of a determinable character, as an estate for life, or the dealing is with an ecclesiastical corporation. And even where time is of the essence of the contract, it may be waived by proceeding in the purchase after the time has elapsed. On the other hand, although time may not be originally of the essence of the contract, still either

party may, by a proper notice, bind the other to complete within a reasonable time. TIT. II.  
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(*Parkin v. Thorold*, 16 Beav. 65; *Hudson v. Temple*, 29 Beav. 536; *Wells v. Maxwell* (No. 1), 32 Beav. 408; *Lord Ranelagh v. Melton*, 2 Dr. & Sm. 278; Sugd. V. & P. 14th ed. 257 *et seq.*; St. § 776; 2 Lead. Cas. Eq. 2nd ed. 442 *et seq.*; *Tilley v. Thomas*, L. R. 3 Ch. Ap. 61; *Cowles v. Gale*, L. R. 7 Ch. Ap. 12.) **413.**

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (7) "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in Equity." **414.**

VII. Where the vendor is incapable of making a complete title to all the property sold, or there has been a substantial misdescription in important particulars, or the terms have not been reasonably complied with on the part of the vendor, Courts of Equity will generally allow the purchaser to proceed with the purchase, *pro tanto*; that is, to have the contract specifically performed as far as the vendor can perform it, and to

Stipulation  
not of the  
essence of  
contracts.

VII. Want  
of title, or a  
substantial  
misdescription,  
or  
want of  
reasonable  
compliance  
with agree-  
ment.

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have an abatement made out of the purchase-money or a compensation. This right to an abatement may be excluded by express condition, even for a deficiency of nearly half, if the purchaser seeks specific performance, though the Court would not enforce specific performance against him. (St. § 779; Sugd. V. & P. 14th ed. 305; 2 Lead. Cas. in Eq. 3rd ed. 498, 499; *Hughes v. Jones*, 3 D. F. & J. 307, 315; *Cordingley v. Cheeseborough*, 4 D. F. & J. 379; *Hooper v. Smart*, L. R. 18 Eq. 683.) But where the land is less than the quantity stated, by a very large proportion, the course is to allow the purchaser to rescind the contract. (*Earl of Durham v. Sir F. Legard*, 34 Beav. 611; *Aberaman Ironworks v. Wickens*, L. R. 4 Ch. Ap. 101.) **415.**

If a person professes to be the owner of the fee simple, and undertakes to sell it, but he is not able to do so, and the purchaser was not aware of his inability, he must convey as much as he can, if the purchaser desires it, and submit to an abatement of the purchase-money. But where husband and wife agree to sell what the purchaser is aware is the wife's estate in fee, and the wife afterwards refuses to convey, the purchaser cannot compel the husband to convey his

interest, and accept an abated price. (*Castle v. Wilkinson*, L. R. 5 Ch. Ap. 534.) **416.** TIT. II.  
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VIII. Where a man has performed a valuable part of an agreement, but is incapable of performing the remainder, by a subsequent accident, without any default on his part, Courts of Equity will enforce the agreement in his favour (allowing such compensation as may be just), in case he is not *in statu quo* as to the part which he has performed, but not otherwise. (St. § 772, 796, 797.) **417.** VIII. Accidental incapacity of performing the remainder of an agreement.

IX. In some cases, a performance of an agreement will be decreed, not according to the letter of the contract, if that would be unconscientious, but according to the change of circumstances. (St. § 775.) **418.** IX. Performance *sub modo*.

X. Of course, an agreement entered into by parties incompetent to contract, such as infants and *femes covert*, will not be enforced against them. Nor will it be enforced in favour of such parties; because the remedy ought to be mutual. (St. § 787, 751, note; *Vansittart v. Vansittart*, 4 K. & J. 62.) **419.** X. Agreement not enforced where the parties were incompetent to contract.

XI. Nor will Courts of Equity enforce a contract, although it is written, if the terms are not certain and definite in themselves: for, in such a case, they might decree pre- XI. Nor where the terms are not certain and definite.

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cisely what the parties did not intend ; and besides this, if any terms are to be supplied, it must be by parol evidence ; and the admission of such evidence would let in all the mischiefs intended to be guarded against by the Statute of Frauds. (St. § 767 ; *Taylor v. Portington*, 7 D. M. & G. 328.)  
**420.**

XII. En-  
forcing  
voluntary  
deeds.

XII. Courts of Equity will enforce an obligation imposed by will, without any consideration. (2 Sp. 255.) But they will not enforce, either against the party himself, or any volunteers claiming under him, any contract or any imperfect gifts *inter vivos* (not being donations *mortis causa*), or imperfect assignments of debts or other property, or executory trusts raised by a covenant or agreement, or defective or imperfect settlements or conveyances, which are not founded in a valuable consideration, even though the transaction be founded on a meritorious consideration, as in the case of a provision for a wife or child ; that is, Equity will not enforce them so far as something is sought beyond that which may be recovered under them at Law, although it will, if necessary, give effect to any legal obligation created by them. But if a transfer, assignment, trust, settlement, or conveyance is complete, so

that no act remains to be done to give full effect to the title, Equity will enforce it throughout against the party making or creating it, and his representatives, although it be merely voluntary. (St. § 433, 787, 793, a. b., 973; 1 Sp. 507; 2 Sp. 52, 57, n. (e), 129, 254, 255, 285, 889-893, 898, 899, 907, 909-915; *Fletcher v. Fletcher*, 4 Hare, 67; *Voyle v. Hughes*, 2 Sm. & G. 18; *Bridge v. Bridge*, 16 Beav. 315; *Weale v. Ollive*, 17 Beav. 252; *Scales v. Maude*, 6 D. M. & G. 43; *Dening v. Ware*, 22 Beav. 184; *Tatham v. Vernon*, 29 Beav. 604; *Beech v. Keep*, 18 Beav. 285; *Donaldson v. Donaldson*, Kay, 711; *Pearson v. Amicable Assurance Office*, 27 Beav. 229; *Woodford v. Charnley*, 28 Beav. 95; *Dilrow v. Bone*, 3 Gif. 538; *Airey v. Hall*, 3 Sm. & G. 315; *Parnell v. Hingston*, 3 Sm. & G. 337; *Milroy v. Lord*, 4 D. F. & J. 264.) And simply to sign a declaration of trust in favour of the donee, is an effectual mode of effecting a voluntary transfer. And if a person directs by letter, though not for valuable consideration, an executor to pay over to another the share to which such person is entitled, and the letter is acted upon by the executor, it will operate as an assignment. (*Kekewich v. Manning*, 1 D. M. & G. 176; *Grant v. Grant*, 34 Beav.

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**TIT. II.** 623 ; *Gilbert v. Overton*, 2 Hem. & M. 110 ;  
**CAP. VIII.** *Jones v. Lock*, L. R. 1 Ch. Ap. 25 ; *Richard-*  
*son v. Richardson*, L. R. 3 Eq. 686 ; *Lamb*  
*v. Orton*, 1 Drew. & Sm. 125.) **421.**

A third person, particularly if a relation, may enforce in Equity a stipulation made by another in his favour, and for which the party who obtained it has given a valuable consideration plainly with a view of benefiting such third person, though such third person, as regards each of the contracting parties, may be a volunteer (2 Sp. 286; *Gale v. Gale*, L. R. 6 Ch. D. 144): as where a person who has contributed a valuable consideration to a settlement has exacted, as part of the contract, that certain property shall be so settled as that the property, whether belonging to one of the parties or the other, shall go to some near relative, in the event of the intended limitation to the issue of the marriage failing to take effect. (2 Sp. 281.) But it would appear that, if the party exacting the stipulation releases the other, the stranger cannot enforce it, unless his condition in life has been altered by the stipulation. (See 2 Sp. 280, 281.) **422.**

A grant or obligation which is voluntary as regards the grantee or obligee, ceases to be voluntary, where, with the privity of the

grantor or obligor, it forms the consideration on the faith of which a marriage is contracted and a settlement executed. (*Payne v. Mortimer*, 1 Gif. 118.) **423.** TIT. II.  
CAP. VIII.

XIII. Equity will not interfere, (1.) Where, in ordinary cases, the contract has become incapable of being substantially performed on the part of the person seeking relief (St. § 736), or has been violated by him. (*Telegraph Despatch, &c., Co. v. McLean*, L. R. 8 Ch. Ap. 658.) (2.) If the plaintiff has been guilty of any negligence affecting the essence of the contract (St. § 771; 2 Lead. Cas. Eq. 2nd ed. 442 *et seq.*); or if specific performance is sought by a purchaser, after he has permitted a long time to elapse, without evincing a fixed intention to carry his contract into execution, although he may have paid part of the purchase-money; or after he has made frivolous objections to the title, and trifled or shown a backwardness to perform his part of the agreement, especially if circumstances are altered (Sugd. Concise View, 181). (3.) If specific performance is sought by the vendor, and there is a substantial defect in the title of the whole or the principal part of the property, not remediable before the decree. (4.) If there is a substantial misrepresentation or mis-

XIII. No specific performance, where it would be morally wrong or inequitable

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description of the estate or property, in a matter unknown to the purchaser, and in regard to which he was not put upon inquiry ; or if it appears upon the evidence that there was, in the description of the property, a matter in which a person might *bond fide* make a mistake, and he swears positively that he did make a mistake, and his evidence is not disproved, the Court will not enforce the specific performance against him. (*Leyland v. Illingworth*, 2 D. F. & J. 248 ; *Higgins v. Samels*, 2 Johns. & H. 460 ; *Swaisland v. Dearsley*, 29 Beav. 430 ; *Cox v. Coventon*, 31 Beav. 378 ; *Dimmock v. Hallett*, L. R. 2 Ch. Ap. 21 ; St. § 778 ; *Denny v. Hancock*, L. R. 6 Ch. Ap. 1.) Where the conditions of sale of a public-house state that it is in the occupation of a tenant, and a brewer agrees to buy it for the sale of his beer, he cannot be compelled to complete his purchase, if he finds that it is under lease to another brewer for a term, of which some years are unexpired. (*Caballero v. Henty*, L. R. 9 Ch. Ap. 447.) (5.) If the title is doubtful, in the opinion of the Court, although the Court itself may have a favourable opinion of the title ; for the Court has no means of settling the question as against adverse claimants, or of indemnify-

ing the purchaser, if its own opinion should turn out not to be well founded. (*Pyrke v. Waddingham*, 10 Hare, 7, 10; *Sykes v. Sheard*, 2 D. J. & S. 6; *Collier v. McBean*, L. R. 1 Ch. Ap. 81; *Mullings v. Trinder*, L. R. 10 Eq. 449.) But if the Court is clearly of opinion that the title is good, it will not be deterred from enforcing specific performance, by the fact that one of the conveying counsel of the Court, or a judge of the Court below, considered the title doubtful. (*Hamilton v. Buckmaster*, L. R. 3 Eq. 323; *Beioley v. Carter*, L. R. 4 Ch. Ap. 230; *Radford v. Willis*, L. R. 7 Ch. Ap. 7; *Bell v. Holtby*, L. R. 15 Eq. 178.) (6.) If the character and condition of the property have been so altered that the terms of the contract are no longer applicable to the existing state of things. (St. § 750.) (7.) If the defendant can show that, by fraud or mistake, the thing bought is different from what he intended: or if there was a great mistake as to the price. (*Webster v. Cecil*, 30 Beav. 62.) (8.) If the estate bought is of a different tenure (2 Lead. Cas. Eq. 2nd ed. 453 *et seq.*); as if it was described as freehold, when in fact it is copyhold (*Ayles v. Cox*, 16 Beav. 23); or copyhold enfranchised under an Act of Parliament reserving to the lord his mineral

TIT. II.  
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TIT. II. rights (*Upperton v. Nickolson*, L. R. 6 Ch.  
CAP. VIII. Ap. 436, 444); or if it was described as free-  
hold when leasehold (*Sugd. Concise View*,  
212), or as copyhold when freehold (*Ayles*  
*v. Cox*, 26 Beav. 23). (9.) If material terms  
have been omitted in the agreement, or there  
has been a variation of it by parol. (St. §  
770.) (10.) If the contract is founded in  
imposition, surprise, misrepresentation, un-  
due influence, or fraud of any kind; as where  
property was put up for sale to the highest  
bidder without mentioning any reserve, and  
the auctioneer and an agent for the vendor  
both bid against each other (*Mortimer v. Bell*,  
L. R. 1 Ch. Ap. 10; 30 & 31 Vict. c. 48), or  
where a purchaser, who is better informed  
as to the value of the property than the ven-  
dor, hurries the vendor into an agreement,  
without giving him an opportunity of inquiry  
or advice (*Walters v. Morgan*, 3 D. F. &  
J. 718). (11.) If, after the day fixed for  
performance is past, specific performance  
is sought by the purchaser, and the price  
is inadequate, or by the vendor, and the  
price is unreasonable. (*Sugd. Concise*  
*View*, 189.) (12.) In the case of one  
entire agreement, the Court cannot decree  
specific performance of part of it, if it is  
unable to decree specific performance of the

other part. (*Stocker v. Wedderburn*, 3 K. & J. 393, 407; *Ogden v. Fossick*, 4 D. F. & J. 426.) But the principle that if the thing must be performed at all, it must be performed *in toto*, does not apply to an agreement which contemplated successive performances of different parts independently of one another. (*Wilkinson v. Clements*, L. R. 8 Ch. Ap. 96, 110.) And where an estate is agreed to be purchased, and certain other things taken at a valuation which are not at all an essential part of the purchase, and the vendor refuses to appoint a valuer, the Court will compel him to convey the estate without them. (*Richardson v. Smith*, L. R. 5 Ch. Ap. 648.) (13.) The Court will not force any one to take a title which it is evident will involve the taker in immediate litigation, unless he knew this when he bought the property. (*Pegler v. White*, 33 Beav. 403.) (14.) The Court will not enforce specific performance, if, on any other account, it would be morally wrong, illegal, or inequitable to do so. (St. § 750, 750 a, 751 a, 769, 787; 2 Lead. Cas. Eq. 2nd ed. 453 *et seq.*; *Directors of the Shrewsbury and Birmingham Rail. Co. v. Directors of the North Western Rail. Co.* 6 H. L. Cas. 113; *Falcke v. Gray*, 4 Drew. 651; *Ormes v. Beadel*, 2 Gif. 166; *Tildesley v.*

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**TIT. II.** *Clarkson*, 30 Beav. 419; *Denne v. Light*, 8  
**CAP. VIII.** *D. M. & G.* 774; *Reeves v. Greenwich Tanning Co.*, 2 Hem. & M. 54; *W—— v. B——*,  
 and *B—— v. W——*, 32 Beav. 574; *Vivers v. Taite*, 1 Moo. P. C. (N. S.) 516; *Cochrane v. Willis*, 34 Beav. 359; L. R. 1 Ch. Ap. 58; *Baskcomb v. Beckwith*, L. R. 8 Eq. 100; *Sykes v. Beadon*, L. R. 11 Ch. D. 170, 190, 193, 197.) **424.**

And where there is a sufficient ground why specific performance should not be enforced against a purchaser, the Court will not enforce it, though something else than that may be his actual motive for resisting specific performance. (*Denny v. Hancock*, L. R. 6 Ch. Ap. 1.) **425.**

The Court will not refuse to decree the specific performance of an agreement on the ground that one of the contracting parties has mistaken its clear legal effect. (*Powell v. Smith*, L. R. 14 Eq. 85.) **426.**

Notwithstanding a party may have taken possession before the fulfilment of the promises of the opposite party to do necessary works, he may set up the non-fulfilment of such promises as a defence to a specific performance of the agreement to take the property. (*Lamare v. Dixon*, L. R. 6 H. L. 414.) **427.**

XIV. In like manner, Equity will not enforce assignments, contracts, or covenants which are against public policy. **428.** And hence,

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XIV. Nor will Equity enforce assignments, contracts, or covenants, against public policy: as in the case of,  
1. Assignments by officers of the government.

1. An officer in the army or navy, or other officer of the government, cannot assign his future accruing pay, or other remuneration connected with the right of the government to future services from him; because it is contrary to the honour, dignity, and interest of the State that its servants should be in danger of being reduced to poverty by anticipating these resources which were intended to place them in a suitable condition of respectability, comfort, and efficiency. (See St. § 769, 1040 c-1040 f, and notes; 2 Sp. 867.) But a man may assign a pension given him entirely for past services: and prize money may be assigned. (2 Sp. 867.) And an assignment of a pension granted by the late East India Company is valid. (*Heald v. Hay*, 3 Gif. 467.) And it has been held that the pension payable to a former officer of the East India Company out of the revenues of India since the Transfer Act, 21 & 22 Vict. c. 106, may be assigned. (*Carew v. Cooper*, 4 Gif. 619.) **429.**

2. On principles of public policy, Equity

2. And those involving



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champerty,  
main-  
tenance, or  
buying of  
pretended  
titles.

will not uphold assignments which involve champerty, or maintenance, or buying of pretended titles. (St. § 1049; see *Reynell v. Sprye*, 1 D. M. & G. 660.) Champerty (*campi partitio*) is properly a bargain between a plaintiff or defendant in a cause, and another person who has no interest in the subject in dispute (*campum partire*), to divide the land or other property sued for between them, if they prevail, in consideration of the other person carrying on the suit at his own expense. Maintenance, of which champerty is a species, is properly an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it. Each of these is punishable both at the Common Law and by statute, as tending to keep alive strife and contention, and to pervert the remedial process of the Law into an engine of oppression. And the stat. 32 Hen. VIII. c. 9, prohibits the transfer of any right or title to hereditaments, unless the seller or his ancestors, or those by whom he claims have been in possession of the same, or of the remainder or reversion thereof, or of the rents and profits thereof, for one year next before the sale. (St. § 1048, and note, and 1048 a; 2

Sp. 869; *Hilton v. Woods*, L. R. 4 Eq. 432.) TIT. II.  
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 And Courts of Equity enforce all the principles of Law upon these points. Exceptions are made, however, to the general rule against champerty and maintenance, in the case of father and son, or of an heir-apparent, or of the husband of an heiress, or of a master and servant, or the like. (St. § 1049; 2 Sp. 870, 871.) **430.**

3. Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, Equity will not enforce the assignment of a mere naked right to litigate, that is, a right which, from its very nature, is incapable of conferring any benefit except through the medium of a suit; such as a mere naked right to set aside a conveyance for fraud. (St. § 1040 g, and note; 2 Sp. 868, 869, 872. See *Hill v. Boyle*, L. R. 4 Eq. 260.) The right to complain of a fraud is not a marketable commodity; and if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the purchaser cannot call upon the Court for a specific performance of the agreement. (*De Hoghton v. Money*, L. R. 2 Ch. Ap. 164.) But a person may take an assignment of the whole interest of another in a contract, or

3. Nor assignments of mere naked rights to litigate.

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security, or property which is in litigation, provided he does not make any advance beyond the mere support of the interest which he has so acquired. Thus, notwithstanding the statute 32 Hen. VIII. c. 9, above referred to, an equitable interest under a disputed contract for the purchase of real estate may be the subject of a sale. If such an interest is sold by the purchaser under such original contract, he becomes in Equity a trustee for his sub-purchaser, and must permit the sub-purchaser to use his name in legal proceedings for obtaining the benefit of the contract. And without entering into any covenants for the purpose, such sub-purchaser is obliged to indemnify the original purchaser from all the acts which he must do for the sub-purchaser's benefit. And so, a legatee may assign his legacy, and a creditor may assign his interest in a debt, although he may have commenced a suit to recover it. (St. § 1050-4; 2 Sp. 863, 868-871; *Myers v. United Guarantee Company*, 7 D. M. & G. 112; *Tyson v. Jackson*, 30 Beav. 384.) In these cases there is an actual interest in the assignor, independently of litigation; and although it may require continued litigation to enforce it, yet the parties may possibly adjust the matter without further pro-

ceedings; whereas, in the case first mentioned, there is no interest in the assignor, or none but what may result from over-setting an interest in the other party.

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#### 431.

4. It is the rule of the Common Law that no possibility, right, title, or thing in action, can be granted to third persons, except in the case of the Sovereign, to whom and by whom an assignment could always be made; for it was thought that a different rule would be the means of multiplying contests and suits. And at Law, until the Judicature Act, 1873, this still continued to be the general rule, except in the case of negotiable instruments and some few other securities, or where a debtor assented to the transfer of a debt, so as to enable the assignee to maintain a direct action against him on the implied promise which resulted from such assent; and except in the case of possibilities coupled with an interest, and contingent interests in real estate, which might be granted and assigned at Law, in consequence of the stat. 8 & 9 Vict. c. 106 (St. § 1039; 2 Sp. 850, 851, 855); and except in the case of assignees of policies of marine or life assurance who might sue in their own names in consequence of the statute 30 & 31 Vict. c. 144, and 31 &

4. Common Law rule against assignment of possibilities or things in action,

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32 Vict. c. 86. And in the case of assignments of bond or other debts which are an exception to the above-mentioned rule, it was necessary to sue in the name of the original creditor; the person to whom it is transferred being regarded rather as an attorney than as an assignee. (St. § 1056.)  
**432.**

is not  
adopted in  
Equity.

Even before the late Statute of Wills, a devise of a possibility coupled with an interest, or of a contingent interest, whether in real or personal estate, was good at Law. (2 Sp. 854.) And a covenant to settle, charge, dispose of, or affect property to be hereafter acquired, will operate in Equity upon the property so afterwards acquired. (2 Sp. 254.) And Courts of Equity gave effect to assignments, for valuable consideration, of trusts and possibilities of trusts, and contingent interests, whether in real or personal estate, contingent gains, such as freight to be earned or a cargo to be procured, and even mere expectancies of heirs to their ancestor's estate, and *choses in action*. For, such assignments of a *chose in action* are considered in Equity as amounting to an agreement to permit the assignee to make use of the name of the assignor at Law, in order to recover the debt, or to reduce the

property into possession; or as a contract entitling the assignee to sue in Equity in his own name, and enforce payment of the debt directly against the debtor, whether he has assented or not, making him, as well as the assignor, if necessary, a party to the action. (See St. § 1040, 1040 c, 1044, 1055, 1057; 2 Sp. 852, 865, 866, 896.) And such assignments of contingent interests, possibilities, and expectancies, are regarded in Equity as amounting to a contract to assign, when the interest becomes vested: and when the interest does so become vested, the claim of the assignee is enforced, not indeed as a trust, but as a right under a contract. (St. § 1040 b.) **433.**

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, (6) "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this

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Assignment  
of debts  
and choses  
in action.

TIT. II. Act had not passed), to pass and transfer the  
 CAP. VIII. legal right to such debt or *chose in action*  
 from the date of such notice, and all legal and  
 other remedies for the same, and the power  
 to give a good discharge for the same, with-  
 out the concurrence of the assignor: Provided  
 always, that if the debtor, trustee, or other  
 person liable in respect of such debt or *chose*  
*in action* shall have had notice that such  
 assignment is disputed by the assignor or  
 any one claiming under him, or of any other  
 opposing or conflicting claims to such debt  
 or *chose in action*, he shall be entitled, if he  
 think fit, to call upon the several persons  
 making claim thereto to interplead concern-  
 ing the same, or he may, if he think fit, pay  
 the same into the High Court of Justice  
 under and in conformity with the provisions  
 of the Acts for the relief of trustees." **434.**

What  
 amounts to  
 an assign-  
 ment.

As a general rule, anything written, said,  
 or done, in pursuance of an agreement, and  
 for valuable consideration, or in considera-  
 tion of an antecedent debt, to place a *chose*  
*in action* or fund out of the control of the  
 owner, and appropriate it in favour of another  
 person, amounts to an equitable assignment.  
 (2 Sp. 855, 860, 861, 907; *Chowne v. Baylis*,  
 31 Beav. 351.) So that an agreement be-  
 tween a debtor and a creditor, that the debt

shall be paid out of a specific fund coming to the debtor, will operate as an equitable assignment. And an order given by a debtor to his creditor upon a person owing money to such debtor, or holding funds belonging to him, directing such person to pay the creditor out of such money or funds, will amount to an irrevocable equitable assignment of such money or funds, or a sufficient part thereof, if made in consequence of a direct agreement. (*Row v. Dawson*, 1 Ves. Sen. 331; *Ex parte South*, 3 Swans. 392; *Lett v. Morris*, 4 Sim. 607; *Burn v. Carvalho*, 4 My. & Cr. 690; *L'Estrange v. L'Estrange*, 13 Beav. 281; *Ex parte Steward*, 2 M. D. & G. 265; *Rodick v. Gandell*, 1 D. M. & G. 777; *Diplock v. Hammond*, 2 Sm. & Gif. 141; 2 W. R. 287; *Watson v. Duke of Wellington*, 1 Russ. & My. 602; *Malcolm v. Scott*, 3 Hare, 39; 2 Sp. 855, 860, 861, 907; Coote Mortg. 3rd ed. 234.) And if such money or fund is handed over to the assignor by the person so ordered to pay, he will be made to pay it over again to the assignee. (*Jones v. Farrel*, 1 D. & J. 208; *Brice v. Bannister*, L. R. 3 Q. B. D. (Ap.) 569.) But where a railway company was indebted to their engineer, who was greatly indebted to his banker, and the engineer

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authorised the solicitors of the company by letter to receive the money due to him from the company, and requested them to pay it to the banker, and the solicitors by letter promised the banker to pay him such money on receiving it; it was held that this did not amount to an equitable assignment of the debt. (*Rodick v. Gandell*, 1 D. M. & G. 763.) And where a consignment of property is made by the owner, not in consequence of any obligation or contract express or implied, but of his own motion, with orders to pay over the proceeds to a third person, this is not an irrevocable appropriation at Law or in Equity, though the third person be a creditor: nor is a merely voluntary arrangement made by the debtor himself for payment of a creditor out of a particular fund, though communicated to the creditor, absolutely binding so that it cannot be revoked, that is, in the absence of special circumstances (as forbearance and the like on the part of the creditor), so as to raise a case of contract or of fraud. (2 Sp. 862.)

### 435.

What must  
be done to  
obtain quasi  
possession  
under an  
assignment.

When an assignment is made, everything must be done towards the obtaining of quasi possession that the subject admits of, in order to prevent payment to the assignor

himself, and in order to acquire by assignment a complete title to a *chose in action*, TIT. II.  
CAP. VIII. as against trustees in bankruptcy or insolvency, or as against subsequent purchasers or incumbrancers, who might otherwise be deceived by apparent possession and ownership remaining in a person who in fact is not the owner, or, in case of voluntary assignments, even as against the assignor himself. Hence notice of the assignment of a debt should be given to the debtor; and if a bond is assigned, it ought to be delivered over to the assignee. (St. § 1047; 2 Sp. 855-7; *Ryall v. Rowles*, 2 Lead. Cas. Eq. 2nd ed. 615 *et seq.*; and remarks of Turner, L.J., in *Ex parte Boulton*, 1 D. & J. 178, 179; *Holroyd v. Marshall*, 2 Gif. 382; 2 D. F. & J. 596; 10 H. L. Cas. 191; *Stansfeld v. Cubitt*, 2 D. & J. 222; *Warriner v. Rogers*, L. R. 16 Eq. 340.) Notice of the assignment of a policy of insurance must be given to the insurance office. (Coote Mortg. 3rd ed. 231; *Thompson v. Tomkins*, 2 Dr. & Sm. 8.) It is not necessary that the notice should be given in the lifetime of the assured: the principle is that it is sufficient if the notice is given to the party having the fund, while it remains in his possession. (*In re Russell's Policy Trusts*, L. R. 15 Eq. 26.) If a policy

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of insurance is deposited with a person to secure an equitable mortgage to him, he will have priority over a second equitable mortgagee, though the first did not give notice to the company, and the second mortgagee did give notice to the company. For one equitable mortgagee without possession of the deeds must be postponed to another who has the deeds. (*Spencer v. Clarke*, L. R. 9 Ch. D. 137, 143.) But in general, in assignments of equitable interests other than equitable estates, he who gives formal notice to the holder of the fund has priority over him who does not. In general, notice to one of several obligors or trustees is sufficient. (*Coote Mortg.* 3rd ed. 231; *Browne v. Savage*, 4 Drew. 635; *Willes v. Greenhill* (No. 1, 2), 29 Beav. 376, 387; 4 D. F. & J. 147; *Bridge v. Beadon*, L. R. 3 Eq. 664; *Lloyd v. Banks*, L. R. 4 Eq. 222; *In re Brown's Trusts*, L. R. 5 Eq. 88; *In re Freshfield's Trust*, L. R. 11 Ch. D. 198.) Where stock standing in the name of a trustee is assigned, and notice cannot be given to the trustee, he who first obtains a distringas on the stock will have a priority. Where a sum standing in the name of trustees is given by a testator as a specific legacy, the executors not having assented to the legacy, the incumbrancer

under the specific legatee who first gives notice to the executors is entitled to priority. TIT. II.  
CAP. VIII.  
 (2 Sp. 857, 858; *Browne v. Savage*, 4 Drew. 635.) In the case of an assignment of an interest in a fund in Court, the assignee should obtain a stop order (*Bartlett v. Bartlett*, 1 D. & J. 127; *Stuart v. Cockerell*, L. R. 8 Eq. 607), unless the fund constitutes part of a testator's estate; in which case notice to the executor will be sufficient without a stop order (*Thompson v. Tomkins*, 2 Dr. & Sm. 8). In the case of an assignment of costs of suit not yet ordered to be paid, notice should be given to the trustees to whom they would be payable. (*Day v. Day*, 1 D. & J. 144.) In the case of an assignment of freight, the assignee should give notice to the charterers of the assignment. (*Brown v. Tanner*, L. R. 2 Eq. 806.) In the case of shares in a company, notice must be given to the company. (*Ex parte Boulton*, 1 D. & J. 163.) But verbal notice to the directors, in the course of the transaction of the business of the company, is sufficient. (*Ex parte Agra Bank*, L. R. 3 Ch. Ap. 555.) It was held that assignees in bankruptcy, who neglected to give notice, lost their priority equally with particular assignees. (*In re Barr's*

TIT. II. *Trust*, 4 K. & J. 219; *Stuart v. Cockerell*,  
CAP. VIII. L. R. 8 Eq. 607; *In re Russell's Policy*  
*Trusts*, L. R. 15 Eq. 26.) But it has since  
 been held by Lord Cairns, L.C. (reversing  
 the decision of Lord Romilly, M.R.), that  
 where the trustee of a fund became  
 acquainted (without notice) of the in-  
 solvency of his *cestui que trust*, and acted  
 on the information, formal notice by a sub-  
 sequent assignee did not give him priority  
 over the assignee in insolvency. (*Lloyd v.*  
*Banks*, L. R. 3 Ch. Ap. 488.) In order to  
 maintain his priority, it is sufficient if a  
 prior assignee of the proceeds to arise from  
 the sale of an officer's commission gives  
 notice to the army agent of the regiment  
 before the money has reached the agent's  
 hands, though a subsequent assignee gave  
 notice first. (*Buller v. Plunkett*, 1 Johns.  
 & H. 441. On the subject of notice in the  
 case of officers, see also *Webster v. Webster*,  
 31 Beav. 393; *Somerset v. Cox*, 33 Beav.  
 634; *Addison v. Cox*, L. R. 8 Ch. Ap. 76.)  
**436.**

Payments to  
 assignee of  
 a debt.

When a debt not legally assignable has  
 been equitably assigned by the creditor to  
 a purchaser for valuable consideration, and  
 the debtor has had notice of the assignment,  
 all payments which he may thereafter make

to the purchaser on account of the debt TIT. II.  
CAP. VIII. must be considered to be well made, so far at least as the debtor is concerned, notwithstanding that the purchaser may in fact, after notice of his purchase to the debtor, have sold or mortgaged the debt to some other person; provided that the payments were made by the debtor without notice of the latter sale or mortgage. Nor, in such a case, is it incumbent on him, before making a payment to the original purchaser, to require production or proof of the original assignment. (*Stocks v. Dobson*, 4 D. M. & G. 11, 17.) **437.**

An equitable assignee of a legal term is not liable to be sued in Equity by the lessor for rent, or for damages in respect of breaches of covenants, even though he may have been in possession. (*Cox v. Bishop*, 8 D. M. & G. 815.) **438.** Suit against equitable assignee of a legal term.

As a general rule, an assignee of a chose Assignees taking subject to equities of assignor. in action, other than a bill of exchange or a note, takes it subject to the same equities as it was liable to in the hands of the assignor. (2 Sp. 863-5; *Mangles v. Dixon*, 3 H. L. Cas. 702; *Smith v. Parker*, 16 Beav. 119; *Rolt v. White*, 31 Beav. 520; *Rodger v. The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393; *Henderson v. The Comptoir*

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CAP. VIII.

*d'Escompte de Paris*, L. R. 5 P. C. 253; *Chartered Bank of India, &c. v. Henderson*, L. R. 5 P. C. 501.) And a trustee in insolvency stands on the same footing as a particular assignee. (*In re Atkinson*, 2 D. M. & G. 140.) But the person entitled to such equities may release them, either expressly or by implication arising from his course of conduct. (*In re Northern Assam Tea Company; Ex parte Universal Life Assurance Company*, L. R. 10 Eq. 458.) **439.**

5. Inter-  
ference in  
regard to  
arbitration.

5. The Courts of Equity will not enforce the specific performance of an agreement to refer any matter; deeming it against public policy to exclude any person from the appropriate judicial tribunals. Neither will Equity compel arbitrators to make an award. Nor, when they have made an award, will Equity compel them to disclose the grounds of their judgment. (St. § 1457; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418.) Nor will it interfere in the case of an agreement which was agreed to be wholly or partly determined by arbitrators who have not yet arbitrated. (*Darbey v. Whitaker*, 4 Drew. 134.) **440.**

Courts of Equity will enforce a specific performance of an award which is unexceptionable, and in which the parties have

acquiesced. (St. § 1458, 1459; *Blackett v. Bates*, 2 Hem. & M. 610.) And where both parties have for a long time acquiesced in or acted upon an award, even though objections might have been originally urged against it, an application to set it aside will not be entertained. (St. § 1459.) But where an arbitrator has been guilty of unfairness or partiality, relief will be given against his award. (*Ormes v. Beadel*, 2 Gif. 166.) But there must be proof, and not merely suspicion, of this. (*Moseley v. Simpson*, L. R. 16 Eq. 226.) **441.**

On the question of setting aside an award, Courts of Law and Equity have acted on the same principles. (*Moseley v. Simpson*, L. R. 16 Eq. 226.) Any kind of irregularities may be waived by the parties. (*Moseley v. Simpson*, L. R. 16 Eq. 226.) **442.**

Where there is an engagement between an architect and his employer that the total outlay shall not exceed a certain amount, and that engagement is concealed from the builder, it annuls a proviso for referring all matters to the arbitration of the architect, so far as the builder is concerned. (*Kimberley v. Dick*, 13 Eq. 1, 19.) **443.**

XV. Courts of Equity will enforce a

XV. Parol contracts enforced.



**TIT. II. specific performance of a parol contract**  
**CAP. VIII. within the Statute of Frauds— 444.**

1. When set forth by plaintiff, and admitted.

1. Where it is fully set forth by the plaintiff, and it is admitted by the answer of the defendant, and the defendant does not insist on the Statute as a bar. For, under these circumstances, there can be no fraud. And, although there may indeed be a temptation to the defendant to commit perjury; yet that is the case with every answer, where the defendant's interest is concerned. And as the defendant does not insist on the Statute, he may be deemed to have waived it; and the rule is, *Quisque renuntiare potest juri pro se introducto*. (St. § 775-777, and notes.) But if the defendant insists on the Statute as a bar, although he confesses the agreement, Courts of Equity will not enforce it; for that would be contrary to the express provisions of the Statute. (St. § 757.) **445.**

2. Where the reducing it to writing was prevented by fraud.

2. Equity will also enforce such a parol agreement where it was intended to be reduced to writing according to the Statute, but that has been prevented by the fraud of one of the parties. (St. § 768.) **446.**

3. Where partly performed.

3. A parol agreement will also be enforced, whether it is an original agreement or a variation of or substitute for a prior written

agreement, where it is a completed agreement, and it has been partly carried into execution, and it is shown, by satisfactory evidence, to be clear, definite, and unequivocal in all its terms. (St. § 759, 764, 770, note; *Lester v. Foxcroft*, 1 Lead. Cas. Eq. 2nd ed. 625, *et seq.*; *Lady E. Thynne v. Earl of Glengall*, 2 H. L. Cas. 158; *Nunn v. Fabian*, L. R. 1 Ch. Ap. 35; *Coles v. Pilkington*, L. R. 19 Eq. 174; *Williams v. Evans*, L. R. 19 Eq. 547.) **447.**

As to the acts which will be deemed a part performance, they should be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement (St. § 762; *Shillibeer v. Jarvis*, 8 D. M. & G. 79); and they must have put the party who has performed them in such a situation that it would be a fraud, in the other party, after allowing him to do them, not fully to perform the agreement. (St. § 761; *Surcome v. Pinniger*, 3 D. M. & G. 571.) For, the ground on which Courts of Equity enforce specific performance in such cases is, that if the party allowing these acts to be done were not obliged to fulfil the agreement, it would be permitting him to commit a fraud, the very evil

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CAP. VIII.

What is  
deemed part  
performance.

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which the Statute was designed to prevent. (St. § 759.) Hence, a depositing, securing, or paying of the purchase-money will not be deemed such a part performance as will take the case out of the Statute; for the money can be recovered back. (St. § 760.) Nor will the delivery of an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations or admeasurements, registering conveyances, and acts of the like preliminary or ancillary and equivocal character, be considered as a part performance of the agreement, so as to take it out of the Statute. (St. § 762.) But if upon a parol agreement the purchaser is admitted into possession, and such possession is exclusively referable to the contract, this amounts to a part performance which will take the case out of the Statute; because he is made a trespasser, and is liable to answer as such, if there is no valid agreement at Law or in Equity. (St. § 761, 763; *Pain v. Coombs*, 1 D. & J. 34.) And so, if a father, in consideration of the marriage of his daughter, makes an oral promise to give his daughter a house, and after the marriage he puts his daughter into possession, and she remains in possession till

his death, the possession prevents the Statute of Frauds being set up as a bar to the proof of the parol contract; and it was held that any incumbrance on the house must be paid out of the settlor's estate. (*Ungley v. Ungley*, L. R. 5 Ch. D. (Ap.) 887.) And so, if upon a parol agreement to grant a lease, the lessee is let into possession, and allowed to spend money on the faith of the agreement, the agreement will be enforced. (*Farrall v. Davenport*, 3 Gif. 363.) But the execution of an indenture of lease by a trustee has been held not to be a part performance of a parol agreement to lease, where the power to lease was only to arise on a request in writing by a married woman, which had not been made. (*Phillips v. Edwards*, 33 Beav. 400.) **448.**

XVI. With respect to a parol variation or addition, it is to be observed that evidence of it was totally inadmissible at Law; and that the most unequivocal proofs of it will be required in Equity; and, in general, it will only be allowed to be used by a defendant in resisting a specific performance; not by a plaintiff in compelling such performance. The reason of this distinction is that the Statute does not say that a written agreement shall bind, so as to prevent a de-

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XVI. Parol  
variations  
or addi-  
tions.

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defendant from insisting on a parol variation thereof, but only that a parol agreement shall not bind. Exceptions occur, however, to this doctrine of the inability of a plaintiff to make use of a parol variation. (1.) Where there has been such a part performance of the parol portion of the agreement as would enable the Court to decree a specific performance in the case of an original and independent agreement. (2.) Where an omission has occurred by fraud; and in cases not within the Statute of Frauds, where there has been a clear omission by mistake. (3.) Where the defendant sets up a parol variation or addition, and the plaintiff seeks a specific performance of the contract, with such variation or addition. (See St. § 770, note, and 770 a; *Woolam v. Hearn*, 2 Lead. Cas. Eq. 2nd ed. 404; *Laver v. Fielder*, 32 Beav. 1.) **449.**

XVII. Pro-  
mise en-  
forced.

XVII. It is the practice of Courts of Equity to enforce strict truth in the dealings of one man with another; so that if one man makes a deliberate promise to another, with a view to induce that other to do a particular act, which, relying on such promise, he accordingly does, the promissor shall be compelled to make good his word. (M. R. in *Loxley v. Heath*, 17 Beav. 532;

*Laver v. Fielder*, 32 Beav. 1, 12; Tudor's <sup>TIT. II.</sup> <sup>CAP. VIII.</sup> *Lead. Cas. in Eq.* 782; *Coverdale v. Eastwood*, L. R. 15 Eq. 121, 131.) Thus, where a testator induces a person to render his valuable services on the faith of a verbal promise, that he would, in consideration of such services, leave such person certain property, and he makes a will leaving such property accordingly, and shows it to the donee, he cannot afterwards revoke the gift. (*Loffus v. Maw*, 3 Gif. 592.) And when a marriage takes place on the faith of a promise to make a settlement, such promise will be enforced. (*Alt v. Alt*, 4 Gif. 84; *Coverdale v. Eastwood*, L. R. 15 Eq. 121.) And where a person intends to make certain provisions, gifts, or arrangements, for the benefit of others, but omits to do so, on the faith of a promise by another person to carry into effect what was so intended, such a promise will be specifically enforced in Equity; so that where an executor promised a testator that he would pay a legacy, and told the testator he need not put it in his will, the executor was decreed specifically to perform the promise. (St. § 781.) **450.**

XVIII. Equity will not enforce the specific performance of an agreement to borrow or <sup>XVIII.</sup> <sup>Agreement</sup> <sup>to borrow.</sup> lend a sum of money. (*Rogers v. Challis*,

TIT. II. CAP. VIII. 27 Beav. 175; *Larios v. Bonany y Gurety*,  
L. R. 5 P. C. 346.) **451.**

**XIX.** Negative agreements.

**XIX.** There are many cases where the agreement is merely negative, and the Court acts merely by injunction; as in the case of a covenant not to dig gravel. These may more properly be termed cases of decrees for specific adherence to agreements. (See St. § 721.) **452.**

**XX.** Payment of penalty.

**XX.** A person cannot evade performance of his contract by payment of the penalty for the breach of it. (2 Sp. 254; *Peachy v. Duke of Somerset*, 2 Lead. Cas. 2nd ed. 895 *et seq.*; *Long v. Bowring*, 33 Beav. 585.) (a) **453.**

(a) As to the general jurisdiction of the Courts of Equity in matters of specific performance, see Fry on Specific Performance, and *Cuddee v. Rutter*, 1 Lead. Cas. Eq. 2nd ed. 709.

### **TITLE III.**

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#### **Of Adjustible Equity.**



## CHAPTER I.

## OF ACCOUNT IN GENERAL.

**TIT. III.** IN matters of account standing on equitable  
**CAP. I.** claims, Courts of Equity have universal  
 Jurisdiction jurisdiction. (St. § 454.) In matters of  
 of Equity. account growing out of privity of contract,  
 and cognizable at Law, Courts of Equity  
 have a general jurisdiction, where there are  
 mutual and complicated accounts, and also  
 where the accounts are on one side, but they  
 are very complicated and intricate, or a  
 remedy which is or was peculiar to a Court  
 of Equity is required. But where the ac-  
 counts, whether receipts or payments, or both,  
 are all on one side, or where there is a single  
 matter on the side of the plaintiff, and mere  
 set-off on the other side, and where, in each  
 case, no complication exists, and no peculiar  
 equitable remedy is sought or required,  
 Courts of Equity will decline taking jurisdic-  
 tion. (See St. § 454, 459, 511, 512; *Phillips*  
*v. Phillips*, 9 Hare, 471; *Fluker v. Taylor*, 3  
*Drew.* 183, 192; *Padwick v. Hurst*, 18 Beav.

575; *Smith v. Leveaux*, 2 D. J. & S. 1; *Shepard v. Brown*, 4 Gif. 208; *Southampton Dock Company v. Southampton Harbour and Pier Board*, L. R. 11 Eq. 254; *Kimberley v. Dick*, L. R. 13 Eq. 1.). The relation of principal and agent does not of itself entitle the principal to come into Equity for an account if the matter can be fairly tried at Law. (*Barry v. Stevens*, 31 Beav. 258; *Smith v. Leveaux*, 1 Hem. & M. 123; 2 D. J. & S. 1.) **454.**

Accounts may be divided into open, stated, Division of accounts. and settled accounts. **455.**

An open account is an account of which Open accounts. the balance is not struck, or which is not accepted by both parties. **456.**

A stated account is one that is accepted Stated accounts. by both parties. This acceptance need not be expressed, but may be implied from circumstances; as, if no objection is made to the account within a reasonable time. What is a reasonable time, is to be determined by the habit of business; and the usual course is required to be followed, unless there are special circumstances, constituting a ground for variation. Between merchants, acquiescence is presumed, under ordinary circumstances, after a lapse of several posts. (St. § 526.) **457.**

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**CAP. I.**

A stated  
account is  
ordinarily a  
bar to a suit  
for an  
account.  
When it is  
not.

Different  
modes of  
relief.

Meaning of  
"surcharge"  
and "fal-  
sify."

*Onus  
probandi.*

Extent of  
the liberty  
to surcharge  
and falsify.

Opening  
settled  
accounts.

It is ordinarily a good bar to a suit for an account that the parties have already stated the items and struck the balance ; for, under such circumstances, there is an adequate remedy in a Court of Law. But if there is any mistake, omission, accident, or fraud, by which the account stated is vitiated, and the balance is incorrectly fixed, a Court of Equity will interfere; in some cases, by directing the whole account to be opened and taken *de novo* ; in others, by allowing it to stand, with liberty to the plaintiff to surcharge and falsify, or by simply opening the account to contestation as to one or two items which are specially set forth by the plaintiff in the suit. (St. § 523.) The showing an omission for which credit ought to have been taken is a surcharge; the proving an item to be wrongly inserted is a falsification. The *onus probandi* is always on the party having the liberty to surcharge and falsify; and the liberty extends to the examination, not only of errors of fact, but also of errors in law. (St. § 525.) **458.**

Generally where an account has been settled, the rule is only to give liberty to surcharge and falsify the account, if errors of fact or of law are shown in the account; but where an account has been settled between

a trustee and his *cestui que trust*, under circumstances of fraud or misrepresentation or undue influence used on the part of the trustee, there is scarcely any length of time that will prevent the Court from opening the account altogether. (St. § 527; 2 Sp. 942.) **459.**

TIT. III.  
CAP. I.

Acquiescence in an account, even for a considerable time, does not of itself establish the fact of the account having been settled. (St. § 528; see *Hunter v. Belcher*, 2 D. J. & S. 194, 202.) **460.**

Acqui-  
escence

Where, however, the demand would have been cognizable at Law, Courts of Equity are governed by the Statute of Limitations. But when the demand is purely equitable and the bar of the Statute is inoperative, they are sometimes regulated by the analogy of Law and sometimes by their own inherent principles, not to entertain stale demands, and not to encourage laches or negligence, from the difficulty of doing entire justice when the transactions have become obscure; and from the consciousness that the repose of titles and the security of property are manifestly promoted by fully acting upon the maxim, *Vigilantibus, non dormientibus, jura subvenient*. (St. § 529; *Knox v. Gye*, L. R. 5 H. L. 656; see *supra*, par. 33.) **461.**

Lapse of  
time.

**TIT. III.** The Statute of Limitations (21 Jac. I. c.  
**CAP. I.**

16) does not apply where a fiduciary relation exists between the parties, whether as express trustee and *cestui que trust*, or as principal and agent. (*Obee v. Bishop*, 1 D. F. & J. 142; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545; *Burdick v. Garrick*, L. R. 5 Ch. Ap. 233.) **462.**

Lapse of time will not of itself bar an executor of his right to have an account of the original testator's estate taken, with a view to ascertain such executor's liabilities as an accounting party. (*Smith v. O'Grady*, L. R. 3 P. C. 311.) **463.**

Appropriation of payments.

The general law as to the appropriation of payments is this: the debtor is entitled to apply the payments, at the time of making them, in such manner as he thinks fit. In default of appropriation by the debtor, the creditor is entitled to determine the application of the sums paid. And if neither does so by an express act, the Law implies an appropriation of such payments to the items of debt in the order of their date. (*Merriman v. Ward*, 1 Johns. & H. 376; St. § 459 a-459 g; *Devaynes v. Noble*, Tudor's Lead. Cas. Merc. Law, 1.) **464.**

Agent liable to account

An agent is not liable to account, except

to his principal; and the case of a charity TIT. III.  
CAP. I.  
 forms no exception to the rule. (*Att.-Gen.* only to his  
principal  
*v. Earl of Chesterfield*, 18 Beav. 596.)  
**465.**

## CHAPTER II.

## OF ADMINISTRATION.

TIT. III.  
CAP. II.I. Juris-  
diction.

I. IN cases of any complication or difficulty, the Court of Chancery had, practically speaking, almost an exclusive jurisdiction in the administration of assets and the distribution of the residue, founded on the notion of a constructive trust, or on some auxiliary ground, such as the necessity for a discovery, formerly existing, or the consideration that the aid, if any, afforded at Common Law or in the Ecclesiastical Court was not plain, adequate, and complete. (St. § 534-543.) And by the stat. 20 & 21 Vict. c. 77, s. 23, the jurisdiction of the Ecclesiastical Court in the distribution of residues is abolished, and is not to be exercised by the Court of Probate. **466.**

II. Proceed-  
ing by  
executor or  
adminis-  
trator.

II. The application for assistance is sometimes made by the executor or adminis-

trator himself, against the creditors generally, when he finds the affairs of his testator or intestate so much involved that he cannot safely administer the estate except under the direction of a Court of Equity. Proceedings for administering the estate, instituted by executors or administrators, are not encouraged; because they may be used unduly to keep creditors out of their money. (St. § 544, 545.)

TIT. III.  
CAP. II.

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**467.**

III. But the aid of the Court is more usually sought by creditors. (St. § 546.) And as a decree in Equity is held of equal dignity and importance with a judgment at Law, a decree on a proceeding of this sort, being for the benefit of all the creditors, makes them all creditors by decree, on an equality with creditors by judgment, so as to exclude, from the time of such decree, all preference in favour of the latter. (St. § 547.) As soon as the decree to account is made in proceedings on behalf of all the creditors, the executor or administrator is entitled to prevent legal proceedings against him by any of the creditors, except under the direction of the Court of Equity by which the decree was made. (St. § 549.)

III. Proceeding of creditors.

**468.**

IV. Assets (that is, property available for

IV. Division of assets.



Tit. III. the payment of debts of a deceased person)  
 Cap. II.

are divided into legal and equitable. Legal  
 Definition of assets are property which creditors may  
 legal assets. make available in a Court of Law for the

payment of debts, as having devolved upon  
 or been recoverable by the executor or ad-  
 ministrator, as such, for that purpose, simply  
 by virtue of his office, even though the prop-  
 erty may be of an equitable nature, and  
 he has consequently been obliged to resort  
 to a Court of Equity to vest it in himself.

Definition of  
 equitable  
 assets.

Equitable assets are property which credi-  
 tors can only make available in a Court of  
 Equity for payment of debts, simply by  
 virtue of an express disposition of the prop-  
 erty, which must be carried into effect by a  
 Court of Equity. Hence it has been held  
 that an equity of redemption of an equitable  
 interest in a sum of money charged on land  
 is legal assets. So, that it is not the legal or  
 equitable nature of the property, nor the  
 remedy of the executor, but the remedy of  
 the creditor, which determines whether the  
 assets are legal or equitable. (See St. §  
 551, 552; 2 Sp. 314, 315; 2 Bl. Com. 244;  
 Burt. Comp. § 734; *Silk v. Prime*, 2 Lead.  
 Cas. Eq. 2nd ed. 82 *et seq.*; *Cook v. Gregson*,  
 3 Drew. 547; *Shee v. French*, 3 Drew. 716;  
*Mutlow v. Mutlow*, 4 D. & J. 539.) **469.**

Equitable assets include real property which the deceased had by will charged with or devised for payment of his debts, although liable for payment of them by Act of Parliament. (St. § 552 a.) **470.**

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CAP. II.

V. Courts of Equity follow the same rules in regard to legal assets which are adopted by Courts of Law, and give the same priority to the different classes of creditors which is enjoyed at Law. And Equity recognises and enforces all antecedent liens, claims, and charges *in rem*, according to their priority, whether those charges are of a legal or an equitable nature, and whether the assets are legal or equitable. (St. § 553.) But equitable assets, with the exception above mentioned, are distributed *pari passu* among all the creditors without regard to the priority or dignity of the debts; and, after they are satisfied, among all the legatees or distributees. But if the fund is insufficient to pay all the debts, all the creditors must abate in proportion. And so if the fund, after payment of debts, is insufficient to pay all the legacies, they must all abate in proportion, unless some priority is specifically given by the testator to some legacies over others. (St. § 554-6; 2 Sp. 314.) But as between specific and pecuniary legatees,

V. Adminis-  
tration of  
legal assets.

Adminis-  
tration of  
equitable  
assets.

Abatement  
of debts, and  
legacies.

**TIT. III.** the loss is to fall wholly on the latter. (2  
**CAP. II.** Sp. 343.) And charitable legacies now  
 abate, as well as legacies of another kind.  
 (St. § 1180.) **471.**

Adminis-  
 tration of  
 assets of in-  
 solvent  
 estates and  
 companies.

By the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77, s. 10), it is enacted (in lieu of the 1st sub-section of section 25 of the principal Act, 36 & 37 Vict. c. 66), that "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of

any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

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CAP. II.

#### 472.

Where one of several residuary legatees or next of kin has received his share of the estate of a testator or intestate, the others cannot call upon him to refund because the assets have been wasted, unless they show that the wasting took place before the share was paid over. (*Peterson v. Peterson*, L. R. 3 Eq. 111.)

#### 473.

Debts actually barred by the Statute of Limitations are not included in a trust for payment of debts. But where a provision is made, either by will or by deed, for payment of debts out of real estate, the statutory time will cease to run, in the former case, from the death of the testator, in the latter from the date of the deed; because the creditor, the *cestui que trust*, is not to be barred by the neglect of the trustee to do his duty. The same principle will apply where personal estate only is assigned in trust for payment of debts. But where personalty is bequeathed for payment of debts, it does not prevent the

Operation of  
the Statute  
of Limita-  
tions as  
regards  
debts.

**TIT. III.**  
**CAP. II.**

running of the statute ; because the trust for payment of debts, with which every executor is clothed, has no such effect. Indeed, such an express trust is inoperative for any purpose. (2 Sp. 357 ; *Moore v. Petchell*, 22 Beav. 172.) **474.**

**VI. Order of  
adminis-  
tration of  
different  
properties  
in payment  
of debts and  
legacies.**

VI. Except so far as the property numbered below as five, six, and seven, may be affected by the recent decisions mentioned below, assets are now generally applied in the payment of debts in the following order : First, the general personal estate is applied, except under the circumstances presently mentioned. Secondly, an estate particularly devised simply for the payment of debts. Thirdly, estates descended. Fourthly, property devised and bequeathed to particular devisees and legatees, but charged with the payment of debts. (St. § 577 ; 2 Sp. 817, 822-4 ; Coote Mortg. 3rd ed. 472-4 ; 2 Jarm. Wills, 2nd ed. 526-7, 535 ; *Phillips v. Parry*, 22 Beav. 279 ; *Wood v. Ordish*, 3 Sm. & G. 125 ; *Scott v. Cumberland*, L. R. 18 Eq. 578.) In *Stead v. Hardaker*, L. R. 15 Eq. 178, the V.-C. Malins is reported to have said : " It appears to me that the rule that descended estates are liable to the payment of debts in priority to the specifically devised estates is a very unreasonable rule."

But in the opinion of the writer the rule is founded in the reason of things. For the specific devisee is expressly an object of the testator's regard, whereas the heir only takes by act of Law. Fifthly, general legacies. Sixthly, lands comprised in a residuary devise. Seventhly, specific legacies and lands specifically devised. (Coote Mortg. 3rd ed. 474; *Dady v. Hartridge*, 1 Dr. & Sm. 236; *Barnwell v. Iremonger*, 1 Dr. & Sm. 242; *Rotheram v. Rotheram*, 26 Beav. 465; *Bethell v. Green*, 34 Beav. 302; *Hensman v. Fryer*, L. R. 2 Eq. 627; *Brownson v. Lawrance*, L. R. 6 Eq. 1; *Powell v. Riley*, L. R. 12 Eq. 175.) In *Hensman v. Fryer*, L. R. 3 Ch. Ap. 420, Lord Chelmsford, C. (on appeal), held that a residuary devise remains specific in effect, notwithstanding the 24th section of the Wills Act, and that a general legatee and a residuary devisee must contribute *pro rata* in payment of debts, which the property first applicable is insufficient to satisfy. If this decision of Lord Chelmsford is right, the properties numbered above as five, six, and seven would all be applied rateably. But in *Dugdale v. Dugdale*, L. R. 14 Eq. 234, and in *Tomkins v. Colthurst*, L. R. 1 Ch. D. 626, the V.-C. Malins refused to follow this

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decision (so far as regards legatees), as clearly erroneous; and held that real estate devised and not charged with debts is not bound to contribute with a general legacy to meet the deficiency of the personal estate for payment of debts. (See also *Farquharson v. Floyer*, L. R. 3 Ch. D. 109.) In *Eddele v. Johnson*, 1 Gif. 22; *Pearmain v. Twiss*, 2 Gif. 130; and *Clark v. Clark*, 4 Gif. 702, the V.-C. Stuart had previously held that lands specifically devised and lands comprised in a residuary devise are to be applied rateably in payment of debts. And the V.-C. Malins, in *Gibbins v. Eyden*, L. R. 7 Eq. 371, decided the same way. And in *Lancefield v. Iggulden*, L. R. 10 Ch. Ap. 136, reversing the decision of Bacon, V.-C., 17 Eq. 556, Lord Cairns, L.C., and James, L.J., decided that specific devisees must contribute rateably with residuary devisees, and regarded the decision of Lord Chelmsford as having settled the question. (See also *Jackson v. Pease*, L. R. 19 Eq. 96.) Eighthly, personalty and realty, over which the person whose estate is to be administered has exercised a general power of appointment. (2 Jarm. Wills, 2nd ed. 526, 528; Sugd. Pow. 8th ed. 474, 540; 2 Lead. Cas. Eq. 2nd ed. 102-4; Trower Dr. & Cr. 295;

*Fleming v. Buchanan*, 3 D. M. & G. 976.) **TIT. III.**  
**475.** **CAP. II.**

A legacy or annuity given generally is payable out of personal estate only. And even when a legacy or annuity is given out of real and personal estate, or where debts are payable out of real as well as out of personal estate, it is the general rule that the personal estate is first to be applied so far as it will extend. The personal estate constitutes the primary and natural fund for payment of debts and legacies, and will first be applied (2 Sp. 334, 818; *Tench v. Cheese*, 6 D. M. & G. 453; *Bright v. Larcher* (No. 2), 4 D. & J. 608), except in the following cases: **476.**

Personal estate primarily applied, except -

1. When there are express words (*Young v. Young*, 26 Beav. 522), or a plain intention of the testator to exonerate his personal estate. (*Coventry v. Coventry*, 2 Dr. & Sm. 470.) And to constitute such a plain intention, directions and expressions which do not necessarily imply more than that the real estate shall make good the deficiency are not enough; there must appear upon the whole testamentary disposition, taken together, an intention so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so

1. In the case of express words or plain intention to the contrary.



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to charge it as to exempt the personal estate. (2 Sp. 336-341, 824; Coote Mortg. 3rd ed. 454; 1 Rep. Leg. by White, 703, 710; 2 Jarm. Wills, 2nd ed. 546-8; *Plenty v. West*, 16 Beav. 180; *Ion v. Ashton*, 28 Beav. 379.) And (1.) If the real estate is directed to be sold for payment of debts, and the personal estate is expressly bequeathed to legatees, then the personal estate will be exonerated by necessary implication. But neither of these circumstances, apart from the other and from circumstances affording similar implication of intention, is a sufficient indication of an intention to exonerate the personal estate. For it is most probable that a direction to sell real estate for the payment of debts, where no disposition is made of the personal estate, was intended to be followed only in the event of the personal estate proving insufficient for the purpose of paying the debts. And, on the other hand, it is most probable that a bequest of personal estate, not by way of specific legacy, where no provision is made for payment of debts out of the real estate, was made subject to the payment of debts out of such personal property. (2 Sp. 340, 341, 818, 823; 2 Wms. on Executors, 6th ed. 1576, 1577.) (2.) Where the

testator gives his personal estate as a whole, and not as a residue, by way of specific legacy to one who is not executor, and another fund is supplied for payment of debts, legacies, and funeral and testamentary expenses, the personal estate is exonerated. (2 Sp. 341; 2 Jarm. Wills, 2nd ed. 562; *Gilbertson v. Gilbertson*, 34 Beav. 354; *Powell v. Riley*, L. R. 12 Eq. 175.) (3.) Where a testator directs the conversion of his real and personal estate, and creates a mixed fund out of the produce, and appropriates that fund for the payment of debts, &c., the two estates comprised in that fund are applicable *pro rata*. But in such case, if there is no conversion out and out, the surplus (if any) will result as real and personal estate. If a portion only of the personal estate is comprised in the fund, the residue will be chargeable only when that fund fails. (Coote Mortg. 3rd ed. 470; 2 Sp. 818; 2 Jarm. Wills, 2nd ed. 529, 531; *Simmons v. Rose*, 21 Beav. 37; 6 D. M. & G. 411; Turner, L.J., in *Tench v. Cheese*, 6 D. M. & G. 467; *Bright v. Larcher*, 3 D. & J. 148; *Allan v. Gott*, L. R. 7 Ch. Ap. 430.) (4.) So where a devise is made, subject to a condition of paying off the incumbrances affecting the

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TIT. III.  
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estate; or where only the residue of the proceeds of real estate, after payment of debts, is devised. (2 Sp. 334, 342.) But where real estate is devised to a person, upon condition of his paying debts and legacies generally, or charged with them generally, or is given to trustees for those purposes, and the personal estate is disposed of by a general residuary bequest, these circumstances will not prevent the personal fund being applied in the first instance in the satisfaction of those demands. (1 Rop. Leg. by White, 695.) And if a testator expressly charges his personal estate with debts of a particular description, namely, with those by simple contract, and then bequeaths that fund, it will not be discharged from debts, &c., generally. (1 Rop. Leg. by White, 706.) And as a general rule, no extrinsic evidence can be admitted to ascertain the intention to exonerate; so that the circumstances of the testator, and the amount of his personal estate and of debts, cannot be taken into consideration. (2 Sp. 337; 1 Rop. Leg. by White, 724.)  
**477.**

If the personal estate is exonerated from debts and legacies in favour of A., and he dies before the testator, by which event the

disposition lapses, the executors or next of kin of the testator who accidentally become entitled to the fund will take it with its primary and natural obligation to discharge the debts and legacies. (1 Rep. Leg. by White, 744.) **478.**

2. When the charge or incumbrance is, in its own nature, real; as in the case of a jointure; or of pecuniary portions to be raised out of lands by the execution of a power; or of pecuniary portions to be raised in favour of daughters under a marriage settlement, out of lands vested in trustees for the purpose; or of a devise of lands to a person charged with, or with a direction to pay, particular sums of money, or to trustees in trust to raise and pay particular sums, as distinguished from a charge or trust for satisfaction of debts or legacies generally. (1 Rep. Leg. by White, 671; 2 Jarm. Wills, 2nd ed. 543, 567-9.) And although there may be also a personal covenant to raise the jointure, portions, or sums, such covenant will only be regarded as an additional security, not as the primary one. If there is no such personal covenant for the payment of portions, but a covenant to settle lands, and to raise a term of years out of the lands for securing the portions, there, even though there be a bond

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2. Where  
the debt or  
charge is  
real.

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to perform the covenant, the portions are not in any event payable out of the personal estate. A mortgage debt (except in such cases as are mentioned in the next two paragraphs), whether the lands in mortgage devolve upon the heir-at-law or a general devisee or a particular devisee, is not considered as in its own nature real, but is primarily payable out of the general personal estate of the testator, where it is not made payable by a devisee. Where the mortgaged estate is devised *cum onere*, it is payable by the devisee. But the expression "subject to the mortgage," in the devise of a mortgaged estate, may sometimes be only descriptive of the estate, and not expressive of an intent that the devise is made *cum onere*. (2 Sp. 819; 1 Rep. Leg. by White, 731, 732; 11 Jarm. & Byth. by Sweet, 797, n. (a); Coote Mortg. 3rd ed. 350, 452; 2 Jarm. Wills, 2nd ed. 534. On this subject, see *Jenkinson v. Harcourt*, Kay, 688; *Bond v. England*, 2 K. & J. 44; *Townshend v. Mostyn*, 26 Beav. 72; *Lady Langdale v. Briggs*, 8 D. M. & G. 391.) **479.**

3. Where the debt was not contracted by the person who died last seised or entitled.

3. Where the debt was not contracted by the person who died last seised or entitled, but by some other person from whom he took it by descent or devise, or by some other

person from whom he purchased it, or from whom his vendor derived it. Thus, where a mortgage was created by an ancestor, and the mortgaged estate descended upon the heir, there, although the heir entered into a collateral contract or covenant, or gave security for payment of the mortgage, yet his personal estate would not be liable to be charged, in favour of any person who should derive title by descent under him to the mortgaged premises, subject to the mortgage. But it is different if the heir or devisee or purchaser did anything which raised a new and independent contract between him and the mortgagee (unless it was simply for the purpose of paying off the debts or legacies of the original mortgagor, as such), or had in any other way made the debt his own. (St. § 571-6, 1003; 2 Sp. 334-6, 393, 394, 819, 824; Coote Mortg. 3rd ed. 453, 478, 479, 481; 1 Rop. Leg. by White, 735, 739, 742; 2 Jarm. Wills, 2nd ed. 536, 539; *Swainson v. Swainson*, 6 D. M. & G. 648; *Townshend v. Mostyn*, 26 Beav. 72; *Ion v. Ashton*, 28 Beav. 379; *Bagot v. Bagot*, 34 Beav. 134.) **480.**

4. By the stat. 17 & 18 Vict. c. 113, it is enacted that, "when any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any

**TIT. III.**  
**CAP. II.**

4. In certain cases where a person dies entitled to land in mortgage after Dec. 31, 1854.

**TIT. III.** land or other hereditaments which shall at  
**CAP. II.** the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to

be made before the 1st January, 1855." TIT. III.  
CAP. II.  
**481.**

An equitable mortgage by deposit and memorandum is within this Act. (*Pembroke v. Friend*, 1 Johns. & H. 132.) And it extends to copyholds. (*Piper v. Piper*, 1 Johns. & H. 91.) **482.**

Leaseholds were held to be not within this Act. (*In re Wormsley's Estate*, L. R. 4 Ch. D. 665.) **483.**

Various other points connected with the construction of this Act have been decided, but they do not come properly within the scope of a work like the present. **484.**

By the stat. 30 & 31 Vict. c. 69, it is enacted that, "in the construction of the will of any person who may die after the 31st day of December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate" (s. 1); and "in the construction of the said



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Act and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator" (s. 2). **485.**

By the stat. 40 & 41 Vict. c. 34, it is enacted that the stat. 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69 (*supra*, par. 481, 485), "shall, as to any testator or intestate dying after the thirty-first December one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate." **486.**

Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons, and the devisees must contribute according to the value of their respective portions. (*In re Newmarch*, L. R. 9 Ch. D. (Ap.) 12.) **486a.**

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CAP. II.

Where real and personal estate are comprised in the same mortgage, the mortgage debt is not primarily payable out of the realty under Locke King's Act, but must, as between the devisees of the realty and the legatees of the personalty, be borne rateably by the realty and personalty subject thereto. (*Trestrail v. Mason*, L. R. 7 Ch. D. 655.) **486 b.**

Where assets of a testator, consisting of personalty which could be identified, are settled *bond fide* upon marriage, they cease to be liable to subsequently accruing claims in respect of breaches of covenant entered into by the testator, but of which the parties to the settlement had no notice when they executed it. (*Dilkes v. Broadmead*, 2 D. F. & J. 566.) **487.**

Non-liability of personalty settled on marriage.

Property specifically bequeathed is not discharged from its liability to the testator's creditors by the circumstance that there has come to the hands of the executors personal property of the testator not specifically be-

Liability of property specifically bequeathed.

TTT. III.  
CAP. II.

---

queathed more than sufficient to pay his debts and funeral and testamentary expenses, and that the specifically bequeathed property has been made over by the executor to the specific legatee ; whatever may be the rights of the specific legatee as regards the executor or residuary legatee. (*Davies v. Nicolson*, 2 D. & J. 693.) **488.**

VII. Order  
of satisfac-  
tion.

VII. In the order of satisfaction, if the personal estate of the deceased is not sufficient for all purposes, creditors are preferred to legatees ; because it is to be presumed that a testator means to be just, by desiring his debts to be paid, before he is generous ; and the personal estate, as we have seen, is the natural fund for the payment of debts. Again, specific legatees are preferred to the heir, because the heir, instead of being expressly an object of the testator's regard, like the specific legatee, only takes by act of Law. Specific legatees are also preferred to the devisees of real estate charged with specialties or with the payment of debts, and to residuary devisees of real estate. But general pecuniary legatees are not preferred to residuary devisees of real estate. Nor are specific devisees of lands, not charged with specialties or with the payment of debts, preferred to specific legatees ; but upon failure of the general personal estate,

TIT. III.  
CAP. II.

the specific devisees and specific legatees shall each, according to the proportionate value of the benefits conferred on each, contribute to the payment of debts. Where a particular portion of the personal estate is bequeathed, subject to the payment of debts and legacies, there, as between the legatees, the residuary personal estate is exonerated, if there is a residuary bequest, but not where there is no gift of the residue. (St. § 571 ; 2 Sp. 343.) As between a devisee of a mortgaged fee simple estate and a specific legatee of personalty, the devisee shall not have his mortgage paid by the specific legatee, but shall take the mortgaged estate *cum onere*. *A fortiori*, a specific legatee of a mortgaged leasehold shall not have the mortgage wholly or partly paid off by specific legatees of other leaseholds. (2 Sp. 838.) Subject to the stat. 17 & 18 Vict. c. 113 (*supra*, par. 481), the devisee of mortgaged premises is preferred to the heir-at-law of descended estates ; because the devisee is evidently an object of the testator's bounty ; and *à fortiori*, the devisee of premises not mortgaged is preferred to the heir-at-law ; and if unencumbered lands and mortgaged lands are both specifically devised, but expressly after

TIT. III.  
CAP. II.

---

payment of all the debts, they are to contribute proportionably in discharge of the mortgage. Where the equities of the legatees and devisees are equal, the Court remains neuter, and suffers the Law to prevail. (See St. § 571 ; 2 Sp. 832, 839, 882.) **489.**

But subject to the stat. 17 & 18 Vict. c. 113 (*supra*, par. 481), where the personal assets are sufficient to pay all the debts and legacies and other charges, there the heir-at-law or devisee, who has been compelled to pay any debt or incumbrance of his ancestor or testator binding on him, is entitled (unless there is some other equity which repels the claim) to have the debt paid out of the personal assets in preference to the residuary legatees or distributees (St. § 571), because such charges are primarily payable out of personal estate. **490.**

And, subject to the same statute, lands devised for or subject to the payment of debts are also liable to discharge a mortgage, in favour of the heir or devisee to whom the mortgaged lands may belong, unless the mortgaged lands are really devised *cum onere*. (St. § 571 ; 2 Sp. 822, and see *supra*, par. 479.) **491.**

Where money is payable under a volun-

tary bond, the assignee for value of an equitable interest in it is entitled to rank as a specialty creditor against the assets of the obligor, though the obligee would not be so entitled. (*Payne v. Mortimer*, 4 D. & J. 447.) **492.**

TIT. III.  
CAP. II.

VIII. There are many cases in which parties, whose right at Law is confined to one fund, would fail to obtain the satisfaction of their just claims, if left to the course of Law, but are enabled to obtain full satisfaction thereof by means of a particular adjustment effected by Courts of Equity, termed the marshalling of assets. This may be defined to be such an arrangement of the different funds of the common debtor of two or more creditors as may satisfy every claim, so far as, without injustice, such assets can be applied in satisfaction thereof, notwithstanding the claims of particular individuals to prior satisfaction out of some one or more of those funds. So that if there are two or more different kinds of funds of the common debtor of several creditors, and at Law one can have recourse to either of those funds, while another is confined to one of them, the former shall either be compelled to seek satisfaction out of that fund to which the latter cannot resort, so far as it will extend,

VIII. Mar-  
shalling of  
assets.

TIT. III.  
CAP. II.

or the latter shall receive compensation out of that fund, in proportion to the amount which the former has unnecessarily taken from that which formed the only source of payment for the latter. (See St. § 558-563; 2 Sp. 827, 828; *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 2nd ed. 56 *et seq.*; *Gibson v. Seagrim*, 20 Beav. 14.) **493.**

Marshalling  
in favour of  
creditors, or  
of legatees,  
or of a por-  
tionist, or of  
the heir, or  
of a devisee.

This plan is adopted as against mortgagees and other creditors of the superior kind, in favour not only of mortgagees and creditors of the superior kind, but also of creditors of an inferior rank, or of legatees (except residuary legatees, where the residue is not exonerated, and legatees whose legacies are given out of a residue), or of portionists, or of the heir-at-law, or of a devisee; and as against simple contract creditors, in favour of legatees (see St. § 562-6, 570; 2 Sp. 410, 819, 820, 827, 829, 833); and as against a person who becomes a surety for a mortgagor on the occasion of a first mortgage, in favour of a second mortgagee (*South v. Bloxam*, 2 Hem. & M. 457). Thus, legatees, with the above exceptions, are permitted to stand in the place of specialty creditors, against the real assets descended, or of a mortgagee who has exhausted the personal estate, whether the mortgaged lands have

Legatees put  
in the place  
of mort-  
gagees and  
specialty  
and simple  
contract  
creditors;

descended to the heir-at-law, or have been devised to a devisee who is to take subject to the mortgage. And where a testator bequeaths legacies, and devises real estate in trust for, or subject to, payment of debts, and the personal estate is exhausted by creditors, the legatees are entitled to come upon the real estate. (*Surtees v. Parkin*, 19 Beav. 406; *Paterson v. Scott*, 1 D. M. & G. 531.) And in consequence of the stat. 3 & 4 Wm. IV. c. 104, which makes real estate liable to simple contract debts, though it was subject to a priority in favour of specialty debts, legatees are permitted to stand, in regard to land descended, in the place of simple contract creditors who have exhausted the personal estate, so as to prevent a satisfaction of the legacies. (St. § 566; 2 Sp. 830.) But residuary legatees, where the residue is not exonerated, and legatees whose legacies are given out of a residue, have no such equity: for a residue of personal estate implies what remains after satisfying the charges upon it. (2 Sp. 820.) And the equity of legatees will not generally prevail against a devisee of the real estate not mortgaged, whether he is a specific or a residuary devisee; for between persons equally taking by the bounty of the testator, Equity will

but not of  
devisees of  
real estate  
not mort-  
gaged.



TIT. III.  
CAP. II.

not interfere, unless the testator has clearly indicated some ground of preference or priority of the one to or over the other. (St. § 565; 2 Sp. 820, 829, 830-2.) (a) **494.**

Marshalling  
as between  
freehold and  
copyhold.

Where one party has a charge on freehold and copyhold estate, and another party a charge on the freehold only, the latter is entitled to require that the former should be satisfied out of the copyhold estate, so far as it will extend. (*Tidd v. Lister*, 10 Hare, 157; 3 D. M. & G. 857.) **495.**

Marshalling  
as between  
legacies  
charged on  
land and  
others not  
so charged.

Administra-  
tion in the  
case of  
charitable  
legacies.

The same marshalling of assets takes place as between legacies charged on land and legacies not so charged. (St. § 566.) But since the statute 9 Geo. II. c. 36, legacies or bequests to charitable uses, payable out of real estate or charged on real estate, or to arise from the sale of real estate, are, with some exceptions, utterly void (St. § 569; and see Smith's Compendium of the Law of Property, 5th ed. par. 1402-5); and Equity has in some modern cases refused to marshal the assets in favour of charitable bequests, when given either directly or by way of trust, out of a mixed fund of real and personal estate, or of personalty connected with realty and pure personalty. Instead of directing the debts and the other

(a) But see *supra*, par. 475.

legacies to be paid out of the real estate or impure personalty, and reserving the pure personalty to fulfil the charitable bequests, the charity legacies have been considered as intended to be charged on the pure personal estate and the proceeds of real estate, or the impure personalty proportionately, like other legacies, as if no legal objection existed to applying the proceeds of the real estate to the charitable bequests; and as charity legacies cannot legally be charged on the proceeds of real estate or the impure personalty, they have been held to fail as to that proportion which would have come to them out of the proceeds of the real estate or the impure personalty. (See St. § 569, 1180; 2 Sp. 233, 235; *Miles v. Harrison*, L. R. 9 Ch. Ap. 316.) In this instance, not only has the principle of favour to charities been discarded, but the Courts have (very improperly, as the writer humbly submits) acted upon a diametrically opposite principle. A testator has the power of directing the charity legacies to be paid out of the pure personalty, and the debts and private legacies out of the mixed personalty or realty. (See Lord Langdale's judgment in the *Philanthropic Society v. Kemp*, 4 Beav. 581; *Robinson v.*

TIT. III.  
CAP. II.

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*Geldard*, 3 Mac. & G. 735 ; and see remarks of V.-C. Stuart in *Jauncey v. Att.-Gen.*, 3 Gif. 319, 320 ; *Wills v. Bourne*, L. R. 16 Eq. 487 ; *Miles v. Harrison*, L. R. 9 Ch. Ap. 316.) And where a testator expressly directs charity legacies to be paid exclusively out of his pure personalty, and the personalty savouring of realty is sufficient for the payment of legacies to individuals, and though the will does not throw the legacies to individuals upon the personalty savouring of realty, yet it does not purport to make those legacies payable at all out of the pure personalty, but gives them without reference to any particular fund, and the pure personalty is not sufficient or only sufficient for the payment of the charity legacies ; the legacies to individuals ought to be paid out of the personalty savouring of realty, so as to leave the pure personalty for the payment of the charity legacies. (*Robinson v. Geldard*, 3 Mac. & G. 735, 747 ; *Beaumont v. Oliveria*, L. R. 6 Eq. 534 ; 4 Ch. Ap. 309 ; *Miles v. Harrison*, L. R. 9 Ch. Ap. 316.) But even in the absence of such an express adjustment the writer conceives that the Courts ought, in favour of charities, to have imputed to testators an intention that the charity legacies should be paid out of that

fund alone out of which they lawfully might be paid. **496.** TIT. III.  
CAP. II.

Where a testator directs charitable legacies to be paid out of pure personalty in precedence of other legacies, but is silent as to the fund for payment of debts, there, though the pure personalty be insufficient to pay all the charity legacies, yet it has been held (improperly, as the writer submits) that the debts and funeral and testamentary expenses and the costs are payable, in the first instance, out of the pure personalty and the mixed personalty rateably, according to their relative values. (*Tempest v. Tempest*, 7 D. M. & G. 470.) **497.**

Marshalling of assets takes place as between simple contract creditors and a vendor of real estate, in respect of his lien for his unpaid purchase-money. (St. § 564 a.) And as against an heir, taking an estate purchased, legatees are entitled to have the assets marshalled, so as to give them the benefit of the vendor's lien. (2 Sp. 833.) And it has been held by Sir J. Romilly, M.R., that this doctrine applies as against a devisee taking the purchased estate. (*Birds v. Askey* (No. 2), 24 Beav. 618; *Lord Lilford v. Powys Keck*, L. R. 1 Eq. 347; but see 2 Sp. 833; *Wythe v. Henniker*, 2 My.

Marshalling  
as between  
simple con-  
tract debts  
and a ven-  
dor's lien.

**TIT. III. & K. 635.)** But the doctrine contained in  
**CAP. II.** this paragraph must be considered to be  
 subject to the operation of the stat. 17 &  
 18 Vict. c. 113, as explained and extended  
 by the stat. 30 & 31 Vict. c. 69, and 40 &  
 41 Vict. c. 34. (See *supra*, par. 481-6.)  
**498.**

Redemption  
 or exonera-  
 tion of a  
 specific  
 legacy.

On analogous grounds, if a specific legacy  
 has been pledged or incumbered with mort-  
 gages or other charges by the testator,  
 the specific legatee is entitled to have  
 his legacy redeemed or exonerated; and if  
 the executor fails to perform that duty,  
 the specific legatee is entitled to com-  
 pensation out of the general assets. In-  
 deed, the same principles apply to specific  
 legatees as to devisees, in respect to the  
 redemption of the subject-matter out of  
 the general assets. (St. § 566 a; 2 Sp.  
 774.) **499.**

Protection  
 of a widow's  
 parapher-  
 nalia.

Again, in order to preserve a widow's  
 paraphernalia, which, with the exception of  
 necessary apparel, is subject to debts, Equity  
 will oblige creditors who are entitled to pro-  
 ceed against real assets or funds to resort to  
 such assets or funds, or will decree her com-  
 pensation out of the same. (St. § 568;  
 2 Sp. 821, 829.) **500.**

**IX. Assets  
 collected in**

**IX.** With regard to the assets of foreigners,

it is to be observed that in general where a domestic executor or administrator collects assets in a foreign country, without any letters of administration taken out or any actual administration accounted for in such foreign country, and brings them home, they will be treated as personal assets to be administered here under the domestic administration. (St. § 583.) **501.**

**TIT. III.  
CAP. II.**

a foreign country by a domestic executor or administrator.

If property is received by a foreign executor or administrator abroad, and afterwards remitted here, an executor or administrator appointed here could not assert a claim to it here, either against a person in whose hands it happened to be, or against the foreign executor or administrator. The only mode of reaching it, if necessary, for the purpose of due administration here, would be to require it to be transferred or distributed after the claims against the foreign executor or administrator had been ascertained and settled abroad. (St. § 584.) **502.**

Assets received by a foreign executor or administrator, and remitted here.

In cases of intestacy, the law of the domicile of the deceased determines the fund out of which debts shall be paid ; and in cases of testacy, the intention of the testator. (St. § 587.) **503.**

The priorities of creditors are regulated

TIT. III. by the domicile of the testator, although the  
CAP. II. personal assets may be situate and adminis-  
tered in another country. (*Wilson v. Lady*  
*Dunsany*, 18 Beav. 293.) **504.**

## CHAPTER III.

## OF MORTGAGES, PLEDGES, AND LIENS.

## SECTION I.

*Of Legal Mortgages of Real Property.*

I. GENERALLY every description of property and every kind of interest in it, which is capable of absolute sale, may be the subject of a legal mortgage or its equivalent in Equity. (2 Sp. 614.) **505.**

TIT. III.  
CAP. III.  
SEC. I.

I. What  
may be  
mortgaged.

II. It may be considered as an almost universal rule, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appears on the deed itself, or by any other instrument, or even by parol evidence, and whether directly or indirectly, it will ever after be considered in Equity as a mortgage, and therefore redeemable on the usual terms, though at the time of the loan or as part of the same transaction, there may be an express agreement between the parties that it shall not be redeemable,

II. What  
amounts to  
a mortgage,  
and what to  
a purchase  
with right of  
re-purchase.



TIT. III. or that the right of redemption shall be con-  
CAP. III.  
SEC. I. fined to a particular time or to a particular  
person or description of persons ; for such  
an agreement will be void. (St. § 1018 ;  
2 Sp. 618-623.) But there may be an ab-  
solute *bonâ fide* sale and conveyance, with  
a collateral agreement for re-purchase and  
re-conveyance on re-payment of the pur-  
chase-money, and such collateral agreement  
may either be introduced into the agreement  
for sale at the time, or may be made at a  
subsequent period. (2 Sp. 619, 621 ; *Alder-  
son v. White*, 2 D. & J. 97.) **506.**

If the money paid by the grantee would  
be a grossly inadequate price for the abso-  
lute purchase of the estate ; if he was not  
let into immediate possession of the estate ;  
if he accounted for the rents to the grantor,  
and only retained an amount equivalent to  
interest ; or if the expense of preparing  
the deed of conveyance was borne by the  
grantor ; each of these circumstances has  
been considered as evidence, showing, with  
more or less cogency, that the conveyance  
was intended merely by way of security.  
(2 Sp. 620, 622.) **507.**

A conveyance will not be deemed a mort-  
gage or held to be a security only, though  
it be for an undervalue, if it is not so gross

as to show that necessity or pressure amounting to fraud could alone have induced the person to enter into such a contract, and though the purchaser afterwards declare that he will take the money given as the consideration at any time, with damages for it, or the like; for if it is not a mortgage *in principio*, it shall not be so by parol agreement afterwards. (2 Sp. 622, 623.) **508.**

TIT. III.  
CAP. III.  
SEC. I.

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Where land is conveyed on trust, in case a sum and interest should not be paid by a day named, to sell, and after payment of principal, interest, and costs, to pay over the surplus and re-convey the unsold part of the estate; and the grantee covenants not to sell without giving six months' notice; and the grantor covenants to pay the debt and interest; but there is no proviso for redemption: this is a mere mortgage, and the grantor is entitled to six months' time to redeem. (*Bell v. Carter*, 17 Beav. 11; *In re Alison*, L. R. 11 Ch. D. (Ap.) 284.) **509.**

Where the transaction is clearly one of purchase with a right of re-purchase, the time limited ought precisely to be observed; and there is no principle on which the Court can relieve, if it is not so observed. (2 Sp. 623.) **510.**

In case the transaction is one of re-pur-

TIT. III.  
CAP. III.  
SEC. I.

chase, and not of redemption, if the purchaser dies seised, and then the right of re-purchase is exercised, the money will go to the real representatives, and not to the personal representatives, as it would in the case of a mortgage. (2 Sp. 624.) **511.**

Mutuality.

If a transaction is to be considered in the light of a mortgage as to one party, it must as regards the other. (2 Sp. 623.) **512.**

III. Mort-  
gagee's  
estate,  
rights, and  
remedies(a).

1. Mortga-  
gee's estate.

III. 1. So long as the mortgagor continues in possession, the mortgagee's estate is not absolute, even at Law. For, by stat. 15 & 16 Vict. c. 76, ss. 219, 220, if an ejectment is brought by the mortgagee, provided no suit is pending in any Court of Equity for redemption or foreclosure, the payment of principal, interest, and costs will, except in certain cases, be deemed a satisfaction of the mortgage, and the Court may compel the mortgagee to re-convey the estate. But when the mortgagor has ceased to be in possession, and there has been a default in the payment of the money at the stipulated time, the estate of the mortgagee becomes absolute at Law. Yet this estate is in Equity treated as a mere security for the principal and interest and costs properly

(a) On the subject of powers of mortgagees, see stat. 23 & 24 Vict. c. 145, Part. II.

incurred in relation to the mortgage, and follows the nature of the debt. And, although, where the mortgage is in fee, the legal estate descends to the heir of the mortgagee, yet in Equity it is deemed a chattel interest and personal estate, and belongs to the personal representatives as assets. (Coote Mortg. 3rd ed. 539; 2 Sp. 296.) **513.**

TIT. III.  
CAP. III.  
SEC. I.

2. As to the mortgagee's rights, he is entitled to enter into possession of the lands, and to take the rents and profits, unless there is some agreement to the contrary; and if the security is insufficient, he may fell timber and sell it towards liquidation of his debt, and may open mines; but, with this exception, he may not commit waste. He may grant leases, subject to the equity of redemption, and avoid any leases that have been made by the mortgagor subsequently to his mortgage. He must, however, account for the rents he receives, or, but for his wilful default, might have received, and pay an occupation-rent for such part as he may keep in his own possession. (St. § 1016, 1016 b; 2 Sp. 642, 645, 646, 648; Coote Mortg. 3rd ed. 332, 343, 344; *Millett v. Davey*, 31 Beav. 470; Tudor's Lead. Cas. Eq. 3rd ed. 975; Seton's Decrees, 3rd ed.

2. Mortgagee's rights.  
Possession,  
leases, rents.

**TIT. III.** 382; *Parkinson v. Hanbury*, L. R. 2 H. L.  
**CAP. III.**  
**SEC. I.** 1.) **514.**

If there are two independent tenements, the mortgagee may take possession of one of them only, so as to become liable to account for default as to that alone. And so if part only of the property (as the land without the shooting or timber) is on lease, the mortgagee may, by taking the rent, make himself accountable for that alone. (*Simmins v. Shirley*, L. R. 6 Ch. D. 173.)

**514a.**

Where persons, who, though in fact mortgagees, enter into possession of the rents and profits in another character (*e.g.*, as purchasers), they are not answerable for what, without wilful default, they might have received. (*Parkinson v. Hanbury*, L. R. 2 H. L. 1.) **515.**

Limit to  
mortgagee's  
advantage.

A mortgagee is not allowed to obtain any advantage out of the security beyond his principal and interest. **516.**

Conversion  
of interest  
into prin-  
cipal.

A mortgagee cannot, in the first instance, stipulate that, if the interest be not paid at the time, it shall be converted into principal. (2 Sp. 628.) To convert interest into principal, the interest must first become due, and then there must be an agreement in writing signed, to make it principal, at least

so as to affect the estate; and the interest cannot even then be turned into principal to the prejudice of subsequent incumbrances of which the mortgagee has notice at the time of the agreement. (2 Sp. 656.) **517.**

TIT. III.  
CAP. III.  
SEC. I.

A stipulation that the mortgagee shall receive interest at 4*l.* per cent. if regularly paid, but 5*l.* per cent. if default be made, is good, if 5*l.* per cent. is reserved by the deed. But if 4*l.* per cent. only is reserved, a stipulation that 5*l.* per cent. shall be paid, if the interest be not regularly paid, is in the nature of a penalty, against which the Court will relieve. (2 Sp. 631.) (a) **518.**

Increase of  
interest on  
default in  
regular  
payment.

Leases made by the mortgagor to the mortgagee at a rent are looked upon with great suspicion, as likely to have originated in the mortgagee having taken advantage of the necessities of the mortgagor to obtain a lease upon terms upon which the property would not have been let except for those necessities. (2 Sp. 632.) **519.**

Leases to  
the mort-  
gagee.

The mortgagee in possession has a right to add to his debt any sums he may be compelled to pay for arrears of rent, or for

What the  
mortgagee  
may add to  
his debt.

(a) As to the validity of an agreement for making a larger amount of principal payable in default of punctual payment, see *Thompson v. Hudson*, L. R. 2 Eq. 612; 2 Ch. Ap. 255.

**TIT. III.** maintaining the title to the estate, or for  
**CAP. III.** re-building the premises, or for necessary  
**SEC. I.** repairs, or the expenses of renewing a renew-  
 able leasehold, with interest from the time  
 the sums were advanced. But he cannot,  
 by contract or otherwise, entitle himself to  
 make any charge for management. (2 Sp.  
 649, 650, 653.) **520.**

A mortgagee in a suit for redemption or  
 foreclosure is entitled to his general costs of  
 suit, unless he has forfeited them by some  
 misconduct. (*Cotterell v. Stratton*, L. R. 8  
 Ch. Ap. 295.) It would be unsafe to deduce  
 any other proposition from this case. **521.**

Allowance  
 for receiver.

The mortgagee is not allowed to make  
 any charge as a receiver, if he himself has  
 personally received the rents, even though  
 it may have been agreed that he should be  
 paid for his trouble in receiving them, and  
 though a receiver might have been employed  
 at the expense of the mortgagor. And  
 before the stat. 23 & 24 Vict. c. 145, and  
 independently of any express provision, it  
 was only where the owner himself, in the  
 ordinary course of management, would have  
 had to employ one, that the mortgagee was  
 entitled to employ a bailiff or receiver, unless  
 with the sanction of the mortgagor. (2 Sp.  
 807.) **522.**

A mortgagee of a West India estate may stipulate that the consignments shall be made to him. And, if out of possession, he may take a certain reward for the management of the estate, provided he do not make that employment a condition. But when he takes possession, he is not at liberty to charge the mortgagor, whom he has ousted, for the trouble he takes on his own account; and he cannot charge or stipulate for commission on consignments, insurance, and the like, but stands in the position of the mortgagee in possession of an English estate. (2 Sp. 630.) **523.**

TIT. III.  
CAP. III.  
SEC. I.

Mortgage of  
West India  
estate.

As a mortgagee is not allowed any advantage beyond securing his principal and interest, where an advowson is mortgaged, and the living becomes vacant prior to the foreclosure, the mortgagee is compellable in Equity to present the nominee of the mortgagor; even although nothing but the advowson is mortgaged, and the deed contains a covenant that on any avoidance the mortgagee shall present. But he may pray a sale of the advowson. (2 Sp. 629.) **524.**

Mortgage of  
advowson.

The mortgagee is at liberty to stipulate for the option of pre-emption, in case the mortgagor should determine to sell. (2 Sp. 631.) **525.**

Pre-emption.



TIT. III.  
CAP. III.  
SEC. I.

Production  
of deeds by  
a mortgagee.

A mortgagee is not bound to produce his mortgage-deed, or indeed any of the deeds in his possession, to the mortgagor or any person claiming under him, until payment of the principal and interest due and his costs, though the application be made *bond fide*, only to obtain information with a view to paying off the mortgage. (2 Sp. 655.)  
**526.**

Right of  
mortgagee  
to devise the  
property.

As an incident to the right of the mortgagee, he is at liberty to devise the legal estate in the mortgaged property to trustees, if he thinks fit, instead of allowing it to descend to his heir-at-law; and the mortgagor must bear the costs of obtaining a reconveyance, although they may have been increased by such devise. (2 Sp. 669.)  
**527.**

Mortgagee  
ejecting or  
refusing  
tenant.

If a mortgagee in possession turns out or refuses to accept a responsible tenant, he is liable for any loss occasioned thereby. (2 Sp. 806.) **528.**

Priority.

Both at Law and in Equity, in the absence of particular circumstances, statutes, judgments, and recognisances, all rank according to their dates. (2 Sp. 727; Coote Mortg. 3rd ed. 410.) And so in Equity do equitable charges of every kind, where the equities are equal in all other respects than

that of priority of time. (2 Sp. 727-732 ; TIT. III.  
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SEC. I. *Shropshire Union Railways, &c., Co. v. The Queen*, L. R. 7 H. L. 496 ; Coote Mortg. 3rd ed. 410 ; remarks of V.-C. Kindersley in *Rice v. Rice*, 2 Drewry, 78 ; *Cory v. Eyre*, 1 D. J. & S. 149.) And where money is lent on an equitable mortgage, without notice of a prior equitable agreement affecting the same property, the lender gains no priority over the party claiming under the prior equitable agreement, by getting in the legal estate, at least after he has notice of the circumstances. (*Mumford v. Stohwasser*, L. R. 18 Eq. 556.) But if a third incumbrancer, by mortgage, without notice of a second incumbrance at the time of lending his money, purchases the first legal mortgage, judgment, statute, or recognisance, even after notice of the second mortgage, so as to acquire the legal title, and holds both securities in his own right, Equity will tack both incumbrances together in his Tacking favour ; so that the second mortgagee will not be permitted to redeem the first, without redeeming the third also ; on the principle, that where the equities are equal, the Law shall prevail. But if a puisne creditor, by judgment, statute, or recognisance, buys in a prior mortgage, he will not be allowed

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to tack his judgment to such mortgage, so as to cut out or postpone a mesne mortgage; because he did not originally advance his money on the immediate credit of the land, and by his judgment, he did not acquire any right in the land, but before the stat. 1 & 2 Vict. c. 110, only a lien on the land, which might or might not be enforced on it (see St. § 412–416, 418, 421; 2 Sp. 734, 735, 737, 740; Coote Mortg. 3rd ed. 209, 210, 383, 385, 389, 403, 407, 408; *Spencer v. Pearson*, 24 Beav. 266; but see 2 Sp. 722, 723); although now, under the 13th section of that Act, a judgment will operate as a charge on real estate, except as regards purchasers, mortgagees, or creditors, who became such before the time for the commencement of the Act, and except so far as the stat. 23 & 24 Vict. c. 38, s. 1, and 27 & 28 Vict. c. 112, affect the case. **529.**

Upon the principle, that, where the equities are equal, the Law shall prevail, if a first mortgagee, who has the legal estate, or the better right to call for it, lends to the mortgagor a further sum on another mortgage, or on a statute or judgment, or even if he lends a further sum on note, and it is distinctly agreed at the time to be on the security of the mortgaged property, he is

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entitled to retain till both sums are paid, as against a mesne mortgage, of which he had no notice at the time of the further advance. (St. § 417, and note; 2 Sp. 721, 735, 739; Coote Mortg. 3rd ed. 409, 410; *Tassell v. Smith*, 2 D. & J. 713.) Indeed, it may be stated more generally, that if a mortgagee has the legal estate, and makes a further advance, without notice of any claim adverse to his title, he is entitled to tack the further advance to the original mortgage as against any such adverse claim. (*Young v. Young*, L. R. 3 Eq. 801.) But where a first mortgage extends to future advances, further advances made by the first mortgagee, after notice of the second mortgage, have no priority over the latter, even though the second mortgagee had notice of the nature of the first mortgage. (*Rolt v. Hopkinson*, 25 Beav. 461; 3 D. & J. 177; 9 H. L. Cas. 514; *Menzies v. Lightfoot*, L. R. 11 Eq. 459.) And if a transferee of a first mortgage advances a further sum, he cannot tack it as against an equitable mortgage subsequent to the original first mortgage, of which equitable mortgage the original first mortgagee had notice, though the transferee had no notice of it. (*Pease v. Jackson*, L. R. 3 Ch. Ap. 576. See *Baker v. Gray*, L. R. 1 Ch. D. 491.) **530.**

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A statute or judgment creditor who is the first incumbrancer, cannot, by buying a subsequent mortgage, tack it to his statute or judgment, because he did not advance his money on the immediate credit of the land. (2 Sp. 740.) And a prior mortgagee, having a bond debt (which *per se* is not a charge on land), whether prior or subsequent to his mortgage, cannot tack it against any intervening incumbrancer of a superior rank between his bond and mortgage, or against other creditors, or even against the mortgagor himself, or a purchaser of the equity of redemption, but only (to avoid circuity of action) against the heir or beneficial devisee, if in the bond the heirs were expressly bound. (St. § 418; 2 Sp. 723-725, 735; Coote Mortg. 3rd ed. 393.) And as copyholds, prior to the stat. 1 & 2 Vict. c. 110, were not liable at Law to an extent, a judgment debt cannot be tacked to a mortgage of copyhold land. (Coote Mortg. 3rd ed. 389.) **531.**

By the stat. 37 & 38 Vict. c. 78, s. 7, "after the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any

legal or other estate or interest in such land; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act." But this was repealed by the stat. 38 & 39 Vict. c. 87, as from the date of operation, "except as to anything duly done thereunder before the commencement of this Act." **532.**

When a puisne mortgagee has bought in a prior incumbrance, but the legal estate is vested in a trustee, or the puisne mortgagee has not obtained the legal title, or he takes *in autre droit*, the incumbrances are paid in the order of their priority in point of time, according to the maxim; *Qui prior est tempore, potior est in jure*, and the principle that he who has the better right to call for the legal title, or for its protection, shall prevail. (St. § 419; 2 Sp. 745.) **533.**

Where a legal mortgage is executed, and

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TIT. III. is registered (in Ireland), and the mortgagor  
CAP. III.  
SEC. I. assigns an apparently satisfactory reason for  
not handing over or producing the title  
deeds to the mortgagee, the legal mortgage  
will not be postponed to a prior equitable  
unregistered mortgage, of which the legal  
mortgagee had no knowledge or notice.  
(*Agra Bank v. Barry*, L. R. 7 H. L.  
135.) **534.**

Postpone-  
ment of a  
prior mort-  
gagee.

Where a first mortgagee voluntarily, distinctly, and unjustifiably, through fraud or gross negligence, allows the mortgagor to retain the title deeds, or allows the mortgagor to get possession of them, he will be postponed to a subsequent mortgagee or purchaser without notice of the prior mortgage. But the onus of proving such fraud or negligence is on the person seeking to postpone the other. (St. § 393, and see § 1010; 2 Sp. 766, 767; *Finch v. Shaw*, 19 Beav. 500; *S.C.*, *Colyer v. Finch*, 5 H. L. Cas. 905; *Carter v. Carter*, 3 K. & J. 617, 646-8; *Espin v. Pemberton*, 4 Drew. 333; *Dowle v. Saunders*, 2 Hem. & M. 242; *Layard v. Maud*, L. R. 4 Eq. 397; *Briggs v. Jones*, L. R. 10 Eq. 92.) So if he conceals his mortgage from a person who, as he knows, is about to lend money to the mortgagor, he will be postponed to that

person. (St. § 390 ; 2 Sp. 732, 766 ; *Wilson v. Wilson*, L. R. 14 Eq. 32.) A second incumbrancer upon an equitable reversionary interest in stock, who has given notice of his incumbrance to the trustees of the property, whether he has enquired of them as to the state of the title or not, will be preferred to a prior incumbrancer, who has omitted to give notice of his incumbrance to the trustees. (2 Sp. 764.) And if a prior incumbrancer on real estate devised in trust for sale, omits to give notice to the trustee, before notice is given of a subsequent incumbrance, he will be postponed to the subsequent incumbrancer. (*Lee v. Howlett*, 2 K. & J. 531 ; *Consolidated Investment and Insurance Company v. Riley*, 1 Gif. 371.) But a mortgagee of an equitable estate in land not directed to be sold has no occasion to give notice to the trustees, either to complete his title as against his mortgagor or to secure to himself his priority against subsequent incumbrancers. (*Rooper v. Harrison*, 2 K. & J. 86.) A declaration of trust of an outstanding term, with a delivery of the deeds creating and continuing the term, has been held to give a subsequent incumbrancer a better equity than a mere declaration of

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**TIT. III.** trust taken by a prior incumbrancer. (St.  
**CAP. III.** § 421 b, and note ; 2 Sp. 729.) And if the  
**SEC. I.** first incumbrancer has a declaration of trust  
 only by the borrower, and none by the  
 trustee, and the second incumbrancer has a  
 formal mortgage of the equity of redemp-  
 tion, and the trustee is a party to that deed.  
 and declares himself to be a trustee for the  
 second incumbrancer, the second will have  
 a better equity to call for the legal estate  
 than the first. (2 Sp. 729.) **535.**

Independently of the stat. 37 & 38 Vict.  
 c. 62, a charge created by an infant (whether  
 representing himself to be an adult or other-  
 wise) will be postponed to a subsequent  
 mortgage executed by him when of full age.  
 (*Inman v. Inman*, L. R. 15 Eq. 260.) **536.**

**3. Mortga-  
 gee's reme-  
 dies.**

**Foreclosure**

3. As to the remedies of the mortgagee to  
 secure the discharge of the mortgage, a  
 foreclosure is in common cases deemed the  
 appropriate and exclusive remedy. (St. §  
 1026.) **537.**

An intermediate mortgagee is entitled to  
 a foreclosure against the mortgagor and the  
 subsequent mortgagees. (2 Sp. 674.) A  
 person entitled to a part only of the mort-  
 gage money cannot foreclose a portion of  
 the estate. (2 Sp. 674.) Proceedings for  
 foreclosure may be taken notwithstanding a

decree for redemption; for the mortgagor may make default. (2 Sp. 675.) Where a decree of foreclosure is made against an infant heir or devisee of the mortgagor, the infant has a year and a day to show cause against the decree on his coming of age; but he can only do this by showing error in the decree, or falsifying the accounts for fraud or error. (2 Sp. 680, 681.) **538.**

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**CAP. III.**  
**SEC. I.**

A foreclosure suit cannot be brought but within twenty years after the right to bring such suit first accrued, or within twenty years after the last payment of any part of the principal money or interest. (See stat. 3 & 4 Will. IV. c. 27, ss. 24, 28, and stat. 7 Will. IV. & 1 Vict. c. 28; Fisher Mortg. 153, 154; Sugd. Stat. 2nd ed. 94; Coote Mortg. 3rd ed. 449.) **539.**

By the stat. 15 & 16 Vict. c. 86, s. 48, on **Sale.** a foreclosure suit being instituted, the Court may decree a sale. Before that Act, where there was no power of sale inserted in the mortgage deed, Courts of Equity refused to decree a sale against the will of the mortgagor, except in these cases: (1.) Where the estate was insufficient to pay the incumbrances. (2.) Where the mortgagor was dead, and there was a deficiency of personal assets. (3.) Where the mortgage was

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of a dry reversion. (4.) Where the mortgagor died, and the estate descended to an infant. (5.) Where the mortgage was of an advowson. (6.) Where the mortgagor became bankrupt, and the mortgagee prayed a sale. (7.) Where the mortgagor was dead, and the mortgagee, by his bill brought against the executor or administrator and the heir, prayed for a sale of the mortgaged estate, alleging it to be a scanty security, and for the payment of any deficiency out of the general estate of the mortgagor. (8.) Where the land in mortgage was subject to a sale by the local Law, as in Ireland. (St. § 1826; 2 Sp. 676-8.) The ground of the distinction, as it respects the first seven of these cases, would appear to be this: that from the nature of the property it would not be worth while to redeem it, or from the circumstances of the mortgagor he or his representatives were unable to redeem it. **540.**

Though a power of sale be harshly exercised, and at a time when, having a regard to the interests of the mortgagee, he would not have been advised to sell, yet the sale cannot be impeached on that account. (2 Sp. 634, 646.) But where the power of sale is given to a trustee, it is his duty to attend equally to the interests of both

parties. (2 Sp. 636.) And a mortgagee ought not to exercise a power of sale for other purposes than the recovery of his money. (*Robertson v. Norris*, 1 Gif. 421 ; affirmed on appeal.) And if he sells, after tender of principal and interest (and costs, unless they are unascertained, and the security ample), the sale will be set aside, as against him and a purchaser with notice of the tender. (*Jenkins v. Jones*, 2 Gif. 99.) **541.**

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A sale may be made without notice to the mortgagor, and without his concurrence, unless that is made a condition. (2 Sp. 635 ; *Newman v. Selfe*, 33 Beav. 522.) **542.**

Where notice to the mortgagor is required, a clause that a purchaser should not be required to ascertain that notice had been given, and that the mortgagee's receipt should be a sufficient discharge, does not apply to a case where the purchase is made with actual knowledge that such notice has not been given. (*Parkinson v. Hanbury*, 1 Drew. & Sm. 143.) **543.**

Where the surplus produce, on the execution of a power of sale in a mortgage in fee is directed to be paid to the mortgagor, his executors, &c., this is not of itself a conversion of the equity of redemption into personal estate. If the sale takes place in the life-

**TIT. III.** time of the mortgagor, the surplus is per-  
**CAP. III.** sonal estate ; but if he dies before the sale  
**SEC. I.** is made, the equity of redemption descends  
 to the heir, and he is entitled to the surplus.  
 (2 Sp. 636.) **544.**

A trustee for sale cannot become the purchaser. (2 Sp. 636 ; Turner, L.J., in *Parkinson v. Hanbury*, 2 D. J. & S. 450.) But a second mortgagee may buy under a power of sale from the first mortgagee ; and in such case he will obtain, as against the mortgagor, an irredeemable title to the property. (*Parkinson v. Hanbury*, 1 Dr. & Sm. 143 ; *Shaw v. Bunny*, 33 Beav. 494 ; 2 D. J. & S. 468 ; *Kirkwood v. Thompson*, 2 Hem. & M. 392.) **545.**

Where there are several incumbrances, a decree for sale of an incumbered estate does not alter the relative rights of the parties : the purchase-money is substituted for the estate. (2 Sp. 678.) **546.**

A mortgagee who sells a part of the mortgaged property must apply the proceeds of sale, first, in payment of interest and costs ; and then he must either pay the balance to the mortgagor, or apply it in reduction of the principal. (*Thompson v. Hudson*, L. R. 10 Eq. 497.) **547.**

Concurrent  
remedies of  
mortgagee.

The Court will not prevent a mortgagee

from using all the remedies belonging to his character of mortgagee, and exercising all the powers that are given to him, as and when he pleases, even concurrently. (2 Sp. 634.) A power of sale is only an additional remedy, and therefore does not interfere with the right of the mortgagee to foreclosure. (2 Sp. 636.) If a debt is secured by the mortgage of real estate, and also by covenant and collaterally by bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor is, by the fact of payment, entitled to redeem the estate, and foreclosure is prevented or not allowed. But if the mortgagee obtains only part payment on the bond or covenant, he may go on with his foreclosure suit, and, giving credit in account for what he has recovered on the bond or covenant, he may foreclose for non-payment of the remainder. On the other hand, if he obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant; but it is held that by doing so he gives to the mortgagor a renewed right to redeem, or, in other words, opens the foreclosure: and consequently upon the com-

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mencement of an action against the mortgagor on the bond after foreclosure, he may proceed to redeem, and upon payment of the whole debt secured by the mortgage, he is entitled to have the estate back again, and the securities given up. After foreclosure, therefore, the Court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his own power, ready to be redeemed, in case the mortgagor should think fit to avail himself of the opening of the foreclosure. (2 Sp. 682.) **548.**

But if a mortgagee (except under a power of sale) so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, the Court will prevent his suing at Law to recover the mortgage money: as where he joins transferees of the equity of redemption in an alienation of the property without being authorised by the mortgagor, and receives no part of the purchase-money. (*Palmer v. Hendrie*, 27 Beav. 349; *Rudge v. Richens*, L. R. 8 C. P. 358.) **549.**

If a mortgagee sells under a power of sale, and the sale does not realise enough to pay off the mortgage debt and interest, he may sue the mortgagor on his covenant for the

balance. (*Rudge v. Richens*, L. R. 8 C. P. 358.) **550.**

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IV. We have already seen that as long as the mortgagor continues in possession, he has a right of redemption, even at Law, under the stat. 15 & 16 Vict. c. 76, ss. 219, 220, if an action of ejectment is brought against him, and no suit for redemption or foreclosure is pending in a Court of Equity. And until foreclosure, the mortgagor, whether in possession or not, is considered in Equity as substantially the owner of the estate, though his ownership is subject to restrictions for the protection of the mortgagee. Hence, if the mortgagor applies to be allowed to redeem, before the right of redemption is lost by a lapse of twenty years, during which no acknowledgment has been made by the mortgagee of the mortgagor's title or of his right of redemption, the mortgagee will then be treated precisely as a trustee for the mortgagor, inasmuch as he will be compelled to re-convey the estate, and account for every kind of profit that he has made in the ordinary way, or which, but for his wilful default, he might have made. (See St. § 1013, 1016, 1028 a; and 3 & 4 Will. IV. c. 27, s. 28; 2 Sp. 644, 645, 648, 710, 806.) **551.**

IV. Mortga-  
gor's estate  
and rights.

Equity of  
redemption.



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The common equity of redemption, or ordinary right which the mortgagor has in Equity of redeeming the estate, is so inseparable an incident to a mortgage that it cannot be disannexed from such a transaction, or controlled even by an express agreement. (St. § 1019; 2 Sp. 618, 619, 628.) And this constitutes an equitable estate in the land, which may be granted, devised, and entailed; and if entailed, might have been barred by a fine or recovery, and may now be barred by a disentailing deed, and is liable to a tenancy by the curtesy, and since the statute 3 & 4 Will. IV. c. 105, s. 2, to dower. (St. § 1015; 2 Sp. 642, 645.) **552.**

A mortgagor may, by a subsequent deliberate act, extinguish his equity of redemption. Thus, a mortgagee may purchase the equity of redemption of the mortgagor. But the Court views such a transaction with jealousy. (2 Sp. 654.) And if a mortgagor in embarrassed circumstances conveys his equity of redemption (under pressure for payment of the mortgage debt), for a sum considerably less than its value, the sale will be set aside. (*Ford v. Olden*, L. R. 3 Eq. 461.) **553.**

The owner of the equity of redemption of part of the estate in mortgage cannot sepa-

rately redeem his part ; the mortgagee has a right to insist that the whole of the mortgaged estate shall be redeemed together. (2 Sp. 666.) And where a mortgagee lends two distinct sums to the same mortgagor on two securities, although they be only equitable securities, and although created by two distinct instruments, and at different times, and although the property in one be real and the other personal, the mortgagor, or any one claiming under him (even a purchaser of the equity of redemption or mortgagee of the estate sought to be redeemed, who had no notice of the mortgage on the estate not sought to be redeemed), cannot redeem the property comprised in one security without redeeming the other also ; for the person who has the two mortgages has a right to consolidate them, so as to insist on both being paid off together. At least this is the case where the security not desired to be redeemed is defective in title or deficient in value. And where two mortgages of distinct estates originally vested in different mortgagees are transferred to one person, even with notice of a second mortgage, the second mortgagee cannot redeem the one estate without the other. And the transferees of a mortgage made by a person who afterwards

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becomes bankrupt are entitled to tack a debt insufficiently secured by a previous mortgage of other property made to them directly, though they took the transfer after and with notice of the adjudication. And where the mortgagee has sold one estate under a power of sale, he may apply the balance of the proceeds of that estate, after payment of the mortgage debt upon it, towards payment of the debt upon the other. (*Vint v. Padget*, 1 Gif. 446; 2 D. & J. 611; 3 D. F. & J. 611; *Selby v. Pomfret*, 1 Johns. & H. 336; 3 D. F. & J. 595; St. § 1023, n.; 2 Sp. 651, 666, 726; Smith's Compendium of the Law of Property, 5th ed. par. 1060; *Wicks v. Scrivens*, 1 Johns. & H. 215; *Neve v. Pennell*, 2 Hem. & Mil. 170; *Beevor v. Luck*, L. R. 4 Eq. 237) **554.**

Who may  
redeem.

Even a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a reversioner, a remainder-man, a judgment creditor, a tenant by *elegit* or by statute merchant, the lord of a manor holding by escheat (as regards a mortgage for a term of years, created by a mortgagor who has died without heirs, though not as regards a mortgage in fee, under which the whole estate has passed to the mortgagee, so that there can be no escheat), and indeed every

other person having a legal or equitable interest in or lien on the land, may insist on redeeming the mortgage, in order duly to enforce his claim; and when any such person does so redeem, he or she becomes substituted to the rights and interests of the original mortgagee. But, as a general rule, a *cestui que trust* must redeem through his trustee; and no creditor or annuitant or legatee of the mortgagor, who has not a specific security upon the property mortgaged, can redeem, though the mortgaged property would, if redeemed, be applied in a course of administration in discharge of his claims. (St. § 1023; 2 Sp. 660-3; *Mildred v. Austin*, L. R. 8 Eq. 220; *Dawson v. Bank of Whitehaven*, L. R. 6 Ch. D. 218.) As regards the right to redeem, there is no substantial difference between a mortgage in the form of a trust for sale and a mortgage in the ordinary form. (*Wicks v. Scrivens*, 1 Johns. & H. 215; *Kirkwood v. Thompson*, 2 Hem. & M. 392.) **555.**

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A purchaser of an equity of redemption cannot redeem an existing mortgage until his purchase is completed. (2 Sp. 668.) **556.**

Every person who has a right to redeem

**TIT. III.** the mortgage may redeem any prior incum-  
**CAP. III.** brancer, on payment of principal, interest,  
**SEC. I.** and costs due to him ; the redeeming party  
 being also liable to be redeemed by those  
 below him, who are all liable to be redeemed  
 by the mortgagor. (2 Sp. 665.) **557.**

Annual  
 rests.

In settling the accounts between the mort-  
 gagor and mortgagee, where the latter has  
 been in possession, sometimes annual rests  
 are made, so that the excess of rent or value  
 beyond the interest may be applied in liqui-  
 dation of the principal. As a general rule,  
 rests are not made where the interest of the  
 mortgage is in arrear at the time when the  
 mortgagee takes possession. But where there  
 is a special reason for making annual rests,  
 as where no arrears or interest are due at  
 the time when the mortgagee enters in pos-  
 session, or any agreement exists between the  
 parties by which the interest in arrear is  
 converted into principal, there, and in such  
 cases, annual rests will be made. (St. §  
 1016 a ; 2 Sp. 809 ; *Scholefield v. Lockwood*  
 (No. 3), 32 Beav. 439.) Where the mort-  
 gagee has sold, and has retained sale money  
 beyond the interest and costs due, a rest  
 must be made at the time of the receipt of  
 such moneys. (*Thompson v. Hudson*, L. R.  
 10 Eq. 497.) Annual rests will equally be

directed in respect of the occupation rent fixed on a mortgagee in possession, as in respect of rents received. (2 Sp. 811.) **558.**

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CAP. III.  
SEC. I.

The mortgagor is not entitled to the possession in respect of his equitable estate, unless there is some special agreement to that effect, but he holds it solely at the will of the mortgagee, who may at any time, without giving any prior notice, recover the same by ejectment against him, unless he is ready to pay principal, interest, and costs, or against his tenants under a tenancy created subsequently to the mortgage; and he is not even entitled to reap the crop. But so long as he continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right, without rendering any account whatever to the mortgagee, though the mortgaged property may have become an insufficient security. But he will not be permitted to do any thing which may diminish the security of the mortgagee. Yet he may cut down timber when in possession, unless the land alone would be a scanty security. (St. § 1017; 2 Sp. 646, 648.) **559.**

Possession.

Rents.

Waste.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, (5) "a mortgagor entitled for the time being to the possession or

Suits for possession of land by mortgagors.

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receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." **560.**

Expendi-  
ture.

A mortgagee in possession is not obliged to lay out money any further than to keep the property in necessary repair; and he has no right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and of protecting the title to the property. Hence he will not be allowed for general improvements made without the consent or acquiescence of the mortgagor. (St. § 1016 b; 2 Sp. 808.) **561.**

V. Mort-  
gage of  
leasehold.

V. Where a mortgage is by assignment of a leasehold interest, the mortgagee (unless there is a special provision to the contrary), as between the mortgagor and the mortgagee, takes the leasehold subject to the

covenants and obligations of the original lease. But if an underlease, instead of an assignment, is taken, the mortgagee is protected. (2 Sp. 614.) **562.**

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CAP. III.  
SEC. I.

A mortgage, whether legal or equitable, of leasehold premises, includes the goodwill of a trade followed on the premises, and the fixtures. (2 Sp. 637.) **563.**

Neither the mortgagor nor the mortgagee of a renewable leasehold is bound to renew, unless it is a part of his contract to do so. If a renewable leasehold is assigned by way of mortgage, an agreement between the landlord and the mortgagee, without the concurrence of the mortgagor, will not bind the mortgagor. (2 Sp. 650 ; Coote Mortg. 3rd ed. 122, 344.) **564.**

Mortgage of  
renewable  
leasehold.

VI. Where the relation of mortgagor and mortgagee subsists, it is hardly possible that an agreement under which the mortgagee is to hold the land at a rent as an equivalent for interest can be supported ; it being considered, independently of the question as to usury in cases under the old law, to be against public policy that such agreements should be permitted to take place between parties, one of whom has an obvious advantage over the other. (2 Sp. 617.) **565.**

VI. Rent  
instead of  
interest.

VII. A solicitor may take a mortgage

VII. Mort-  
gage for  
costs.



**TIT. III.** security from his client for costs already due,  
**CAP. III.** but (except so far as the stat. 33 & 34 Vict.  
**SEC. I.** c. 28, may apply) not for costs to become  
 due. (2 Sp. 630.) **566.**

**VIII.** Con-  
 veyance in  
 trust to sell.

**VIII.** Lands are sometimes conveyed by way of security to a third person agreed upon by the borrower and a lender, or to the lender himself, in trust, upon non-payment of the loan at the appointed time, and usually upon notice, to sell the estate, to satisfy the debt out of the proceeds. This is a species of mortgage. It is not such a trust for sale as the mortgagor can enforce; because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot foreclose, but is limited to his remedy by sale. And in this case, though the mortgagor covenant to join, the purchaser cannot require that he should join in the conveyance. (2 Sp. 634; *Locking v. Parker*, L. R. 8 Ch. Ap. 30.) **567.**

**IX.** Defec-  
 tive mort-  
 gage.

**IX.** Where a person affects to make a mortgage, but the deed is defective, further assurance will be enforced in Equity. (2 Sp. 639.) If a man, after making a defective mortgage to one person, makes a mortgage by an assurance which is effectual to another person, the second will prevail, if he lent his money on the security of the land, and

without notice ; because he has equal equity and the legal title. (2 Sp. 639.) But (so far at least as the stat. 1 Vict. c. 110 does not alter the case) a defective mortgage would prevail against a mere subsequent judgment creditor, who is in the nature of a volunteer as regards his lien on the land. (2 Sp. 639, 640.) **568.**

TIT. III.  
CAP. III.  
SEC. I.

X. A mortgagee, whose money is not paid on the day appointed by the proviso, is entitled to six months' notice previously to its being paid. If the money is not tendered on the day of the expiration of the notice, the mortgagee is entitled to another six months' notice. If the mortgagee refuse to receive his money after due notice, interest will cease from the time of the tender, provided the mortgagor keep the money continually ready and make no profit by it. The first mortgagee is bound to accept payment of his principal, interest, and costs when tendered by a second mortgagee, and thereupon to convey to him the estate, whether the tender be made with or without the privity of the mortgagor ; and, generally speaking, he is justified in accepting payment from, and transferring the legal estate to, any person who tenders the principal, interest, and costs due to him, that person being

X. Payment  
of debt.

R

TIT. III. interested in the equity of redemption. (2  
CAP. III. Sp. 652, 653.) **569.**  
SEC. I.

---

If the condition is for payment to the mortgagee, his heirs *or* his executors, the mortgagor, after the death of the mortgagee and before forfeiture, may pay either the heir or the executor, as he pleases, but after forfeiture the money is to be paid to the executor; and even if paid to the heir before forfeiture, it belongs to the executor; because in Equity a mortgage debt is considered as part of the mortgagee's personalty; the money came from that source, and is to be returned to it. (See 2 Sp. 650, 651.) **570.**

When an agreement for a mortgage contains a stipulation that the principal money shall not be called in for a certain time, the postponement is conditional on punctual payment of interest. (*Seaton v. Twyford*, L. R. 11 Eq. 591.) **571.**

If a mortgagor pays off the principal to the solicitors of the mortgagee, instead of the mortgagee himself, without ascertaining that they are authorised to receive it, he does it at his own risk. So that if the solicitors misappropriate the money, the mortgagor will remain liable to the mortgagee or his assignee. (*Withington v. Tate*, L. R. 4 Ch. Ap. 288.) **572.**

And, on the same principle, if the mortgagor has not received the money, the mortgagee cannot maintain the validity of the mortgage deed by showing that he paid the money to the mortgagor's solicitor, unless the mortgagee can show that the mortgagor's solicitor was expressly authorised to receive the money by the mortgagor. And the mere fact that the mortgagor's solicitor was in possession of a mortgage deed executed by the mortgagor does not authorise the mortgagor's solicitor to receive the money for the mortgagor. (*Ex parte Swinbanks; In re Shanks*, L. R. 11 Ch. D. 525.) **572a.**

TIT. III.  
CAP. III.  
SEC. I.

XI. There is a kind of mortgage called a Welsh Mortgage, which, however, has now fallen into disuse, in which there is no condition or proviso for repayment at any time. The agreement is that the mortgagee, to whom the estate is conveyed, shall receive the rents till his debt is paid; and in such case the mortgagor and his representatives are at liberty to redeem at any time. (2 Sp. 616.) **573.**

XI. Welsh mortgage.

XII. Where a husband is seised *jure uxoris*, and he and his wife join in a mortgage, reserving the equity of redemption to him and his heirs, he has the equity of redemption *jure uxoris* as he before had the

XII. Mortgage of wife's estate.

TIT. III. legal estate, unless it is evident that the  
 CAP. III. transaction is more than a mere mortgage,  
 SEC. I. or the limitation of the estate is perfectly  
 distinct from the equity of redemption. (2  
 Sp. 644. See also *Earl of Huntingdon v.*  
*Countess of Huntingdon*, 2 Lead. Cas. Eq.  
 2nd ed. 388 *et seq.*; *Eddlestone v. Collins*, 3  
 D. M. & G. 1; *Whitbread v. Smith*, 3 D. M.  
 & G. 727; *Heather v. O'Neil*, 2 D. & J.  
 399; *In re Betton's Trust Estates*, L. R. 12  
 Eq. 553.) But at the same time the inten-  
 tion to alter the previous title may be mani-  
 fested by the language of the proviso itself,  
 and there is no necessity for an express  
 declaration or a recital to that effect. (*Atkin-*  
*son v. Smith*, 3 D. & J. 186, 192.) **574.**

Where a mortgage is made of the wife's  
 lands, to secure money borrowed by the hus-  
 band—and in the absence of evidence to  
 the contrary, the loan will be presumed to  
 have been obtained for his purposes—his  
 estate, especially where he covenants to pay  
 the debt, is made to pay the mortgage-  
 money, at the instance of the wife or of the  
 heir of the wife; although the husband may  
 have paid off the mortgage, and taken an  
 assignment in trust for himself, his execu-  
 tors, &c., and though by consequence legacies  
 given by the husband may be defeated: for

the wife joining in the security does not make it less the debt of the husband, and her estate is considered as surety only for the debt. (2 Sp. 841, 842. See *Scholefield v. Lockwood* (No. 1), 32 Beav. 434, as a case to which this doctrine did not apply.) **575.**

TIT. III.  
CAP. III.  
SEC. I.

XIII. After notice of a second mortgage, the first mortgagee is answerable to the second for the rents and profits he has received or might have received. (2 Sp. 648.) And where the mortgagee enters, and then permits the mortgagor to receive the rents, he will be accountable, as mortgagee in possession, to a subsequent incumbrancer, of whose incumbrance he had notice. (2 Sp. 806.) **576.**

XIII. First mortgagee answerable to second.

XIV. The mortgagee, or those claiming under him, cannot dispute the title of the mortgagor. (2 Sp. 654.) **577.**

XIV. Title.

XV. An assignment of a mortgage is an assignment of the debt, and it is not necessary that notice should be given to the mortgagor. (2 Sp. 645; *Withington v. Tate*, L. R. 4 Ch. Ap. 288.) **578.**

XV. Assignment of mortgage.

If a mortgagee in possession assigns over his mortgage without the assent of the mortgagor, the mortgagee is still bound to answer for the profits both before and after the assignment, though assigned only for his

TIT. III. own debt ; for he is under a trust to answer  
CAP. III. for the profits of the pledge. (2 Sp. 656.)  
SEC. I.

**579.**

The assignee of a mortgagee cannot stand in any different character or hold any different position from that of the assignor himself. (*Walker v. Jones*, L. R. 1 P. C. 50. See *Pease v. Jackson*, L. R. 3 Ch. Ap. 576.)

**580.**

Where a person obtains a mortgage without consideration, and the mortgagee transfers it to a third person, who has no notice of the want of consideration, neither the transferor nor the transferee can enforce it, but it will be ordered to be cancelled. (*Parker v. Clarke*, 30 Beav. 54.) **581.**

If a person pays off a first mortgage, and takes the deeds and a new mortgage without notice of a second equitable mortgage, he will be entitled to priority over the second equitable mortgagee who had notice of the first mortgage. (*Pease v. Jackson*, L. R. 3 Ch. Ap. 576.) **582.**

XVI. What a purchaser of a mortgage has a right to claim.

XVI. The purchaser of a mortgage, as a general rule, has a right to claim, against the mortgagor, and all deriving title under him, the full amount of what is due on the security, whatever he may have given ; for as he takes the risk, so he is allowed the

gain, if any. But an heir, a trustee, an agent, or an executor of the mortgagor, can only claim the amount which he gave for it; unless he has bought in that security to protect one of his own. (2 Sp. 657, 739; *Hobday v. Peters* (No. 1), 28 Beav. 349.) **583.**

XVII. A gift of a mortgage security is a gift of all the testator's interest in the money and the security. (2 Sp. 655.) **584.**

XVIII. Where a testator devises all his real estates, whatsoever and wheresoever, the legal estate in mortgaged premises will pass by the will, unless a different intention is to be collected from the context. But it would seem that a general devise, or even a particular devise of the mortgaged lands, will not of itself have the effect of carrying the beneficial interest in the mortgage. (2 Sp. 655; *Braybroke v. Inskip*, Tudor's Lead. Cas. on R. P. 2nd ed. 876 *et seq.*; *Bowen v. Barlow*, L. R. 11 Eq. 454; 8 Ch. Ap. 171.) **585.**

XIX. Generally speaking, a purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards the subsequent incumbrancers, as if he had himself been the mortgagor. And where a second equitable mortgagee, who becomes such without notice

TIT. III.  
CAP. III.  
SEC. I.

XVII. Gift  
of mortgage  
security.

XVIII. De-  
vise by a  
mortgagee.

XIX. Right  
of purchaser  
of equity of  
redemption.

Right of  
second  
equitable  
mortgagee.



**TIT. III.** of the first equitable mortgage, afterwards,  
**CAP. III.** with notice of the first incumbrance, obtains  
**SEC. I.** the legal estate from the mortgagor, he holds  
 the legal estate subject to the first incumbrance. (2 Sp. 746.) **586.**

**XX.** Extin- **XX.** If a mortgage is cancelled by a mort-  
 guishment gagee, and it is so found in his possession on  
 of the mort- his death, it is as much a release as cancelling  
 gage debt by a bond. But it does not convey or revest  
 cancelling. the estate in the mortgagor ; for that must be  
 done by some deed : the legal estate in such a  
 case descends upon the heir ; but there being  
 no debt at Law or in Equity, at least upon  
 the mortgage, the Court holds the heir to be  
 a trustee for the mortgagor. (2 Sp. 749.) **587.**

**XXI.** Or by **XXI.** If the debt is paid off, the mort-  
 payment, gage is extinguished in Equity, and the  
 mortgagee is deemed a trustee for the mort-  
 or by gagee. (2 Sp. 640.) And an extinguish-  
 merger. ment of the mortgage debt will take place  
 where the mortgagee becomes the absolute  
 owner of the equity of redemption ; for then  
 the equitable estate merges in the legal ;  
 unless it was apparently his intention, or it  
 is manifestly for his interest, to keep the in-  
 cumbrance alive. (St. § 1035 b ; see *Hayden*  
*v. Kirkpatrick*, 34 Beav. 645.) **588.**

Where a mortgagor and mortgagee join  
 in conveying the mortgaged premises to a

new mortgagee, the old mortgage *may* not be extinguished as regards priority over a subsequent incumbrance, though the old mortgage debt be paid off by the new mortgagee, and though there be a new covenant by the mortgagor, and a new proviso for redemption, and though there be no assignment of the old mortgage debt, if the operative words extend in the usual way to all the right and title of the old mortgagee in the premises. (*Phillips v. Gutteridge*, 4 D. & J. 531.) **589.**

TIT. III.  
CAP. III.  
SEC. I.

XXII. The mortgagee cannot be compelled to reconvey until the money is in pocket: payment into Court is not sufficient. (2 Sp. 653.) **590.**

XXII. Re-convey-  
ance (a).

XXIII. Where a person makes a mortgage in fee, and dies intestate without heirs, the equity of redemption does not escheat to the Crown, but belongs to the mortgagee, subject to the debts of the mortgagor. (*Beale v. Symonds*, 16 Beav. 406.) **591.**

XXIII.  
Death of  
mortgagor  
intestate,  
and without  
heirs.

(a) On this subject see stat. 7 & 8 Vict. c. 76, s. 9, repealed by stat. 8 & 9 Vict. c. 106, s. 1; and see stat. 13 & 14 Vict. c. 60, ss. 19, 20; 37 & 38 Vict. c. 78, s. 4.

## SECTION II.

*Of Equitable Mortgages.*

TIT. III. Besides mortgages created by a formal  
 CAP. III.  
 SEC. II. instrument, and valid at Law as well as  
 in Equity, there are Equitable Mortgages. These are created either by a written instrument, or by a deposit of deeds with or without writing. (2 Sp. 777; *Russel v. Russel*, 1 Lead. Cas. Eq. 2nd ed. 541 *et seq.*) Any written agreement or directions, or other instrument in writing, showing that it was the intention of a debtor thereby to make his land or other property a security for the debt, will be equivalent in Equity to an actual mortgage by deed or to a pledge. (2 Sp. 777-979; *Fenwick v. Potts*, 8 D. M. & G. 506; *Daw v. Terrell*, 33 Beav. 218.) And a deposit of all or some of the material deeds or documents of title constitutes an equitable mortgage, though they do not show a good title in the depositor (as where they do not comprise the conveyance to him), if made with a creditor (whether with or without any written memorandum, and even without a word passing), as security

for an antecedent debt, or on a fresh loan of money, and if received by him (as far as it would appear) in good faith and in the belief that they were the title-deeds of the estate. (St. § 1020 ; 2 Sp. 781 ; *Lacon v. Allen*, 3 Drew. 579 ; *Roberts v. Croft*, 24 Beav. 223 ; 2 D. & J. 1 ; *Dixon v. Muckleston*, L. R. 8 Ch. Ap. 155.) **592.**

TIT. III.  
CAP. III.  
SEC. II.

Where the Court is satisfied of the good faith of the person who has got a prior equitable charge, and that he was led to believe that he had got the necessary deeds, the Court will not hold that he was bound to examine the deeds. And if he does not, and they do not show any title in the mortgagor, yet such equitable mortgagee is entitled to priority, even over a second equitable mortgagee, without notice, who has deeds which show a complete title in the mortgagor, and has a memorandum of deposit. (*Dixon v. Muckleston*, L. R. 8 Ch. Ap. 155.) This is only defensible on the ground of public convenience, in facilitating loans by means of equitable mortgages. It illustrates the great danger of lending on such securities. **593.**

The deposit will cover subsequent advances, if it clearly appears that they were made upon the faith of that security, or that

**TIT. III.** the original deposit was continued with an  
**CAP. III.**  
**SEC. II.** agreement for a further advance. (2 Sp. 781.) **594.**

The meaning and object of the deposit may be explained by parol evidence. (2 Sp. 784.) And evidence is admissible to show that a delivery of deeds to a third person, by a person not being the party whose estate is sought to be charged, even though no money passed at the time, constituted an equitable mortgage. (2 Sp. 784.) **595.**

An equitable mortgagee, by deposit of title-deeds, will have preference over a subsequent purchaser or mortgagee of the legal estate with notice; but not over a subsequent purchaser or mortgagee who has the legal estate, and had no notice of such equitable mortgage. (Coote Mortg. 3rd ed. 170.) **596.**

An equitable deposit with memorandum of charge by a devisee is an alienation which *pro tanto* prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets, under the stat. 3 & 4 Will. IV. c. 104. (*British Mutual Investment Co. v. Smart*, L. R. 10 Ch. Ap. 567.) **597.**

An equitable incumbrancer on property, who has distinct notice of a prior incumbrance, cannot, by concealing his knowledge

from his assignee, give such assignee a better right than that which he himself possesses. (Ford v. White, 16 Beav. 125.) **598.**

TIT. III.  
CAP. III.  
SEC. II.

Where a trustee of funds, invested on a mortgage in his name, deposits the deeds, without notice of the trust, to secure an advance to himself, the *cestuis que trust* are entitled to priority over the equitable mortgagee, and to delivery up of the deeds. (Newton v. Newton, L. R. 6 Eq. 135.) **599.**

Where a simple contract debt has been secured by a deposit of deeds, unaccompanied by any stipulation as to interest, or any memorandum from which an exclusion of interest can be inferred, the mortgagee is entitled to interest, at the rate of 4*l.* per cent., on the principle that a deposit of deeds to secure a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds, with interest. (*In re Kerr's Policy*, L. R. 8 Eq. 331.) **600.**

The relief to which an equitable mortgagee by deposit is entitled is foreclosure, and not sale. (*James v. James*, L. R. 16 Eq. 153; *Pryce v. Bury*, L. R. 16 Eq. 153, n.; *Backhouse v. Charlton*, L. R. 8 Ch. D. 444.) But if the deposit is accompanied by an

TIT. III. agreement to execute a legal mortgage, the  
CAP. III. mortgagee is entitled to either sale or fore-  
SEC. II. closure. (*York Union Banking Co. v. Artley*,  
L. R. 11 Ch. D. 205.) **601.**

## SECTION III.

*Of Mortgages and Pledges of Personal Property.*

I. A mortgage of personal property is a transfer of the ownership itself, subject to be defeated by the performance of the condition within a certain time. But a pledge only passes the possession, or at most a special property, to the pledgee, with a right of retainer till the debt is paid or the engagement is fulfilled. (St. § 1030 ; 2 Sp. 771.)

**602.**

TIT. III.  
CAP. III.  
SEC. III.

I. A mortgage and a pledge distinguished from each other.

II. A mortgage or a pledge of personal property may be held till a subsequent debt or advance, without notice of a mesne incumbrance, is paid, as well as the original debt (except in a case of a bankruptcy), on the ground that it may be presumed that the mortgagee or pledgee would not have lent the further sum except on the credit of the mortgage or pledge, and that he who seeks equity must do equity. This presumption may indeed be rebutted by circumstances ; but, unless it is rebutted, it will generally prevail in favour of the lien,

II. Tacking.



TIT. III. against the pledgor himself, although not  
 CAP. III. against his creditors having a specific lien  
 SEC. III. or interest in the property, or against subsequent purchasers of the equity of redemption. (St. § 1034 ; 2 Sp. 772, 773.) **603.**

A mortgagee whose security exceeds the debt secured, may apply the balance in payment of any unsecured debt due to him from the mortgagor, as against the mortgagor's executors. (*In re Haselfoot's Estate, Chauntler's Claim*, L. R. 13 Eq. 327.) **604.**

III. Mortgagor's right to redeem, and mortgagee's right to sell.

III. A mortgagor of personal property may redeem, if he applies within a reasonable time. But, on the other hand, the mortgagee may, on due notice, sell the property, instead of proceeding to foreclose. (St. § 1031 ; 2 Sp. 637 ; *Carter v. Wake*, L. R. 4 Ch. D. 605.) The reason would appear to be that on which a Court of Equity acts in not decreeing a specific performance of agreements respecting personal property ; namely, that other things of the same kind, and of the very same worth, even to the owner himself, may be purchased for the sum which the articles in question fetch ; and therefore if such property is mortgaged, the mortgagee may properly be allowed to sell it, on due notice, without the inconvenience of foreclosure. **605.**

IV. If a person transfers his shares in a company by way of mortgage, and the mortgagee, as registered owner, becomes liable for calls or other payments, he cannot compel his mortgagor to indemnify him, unless he comes to redeem. (2 Sp. 774.) **606.**

TIT. III.  
CAP. III.  
SEC. III.

IV. Mortgage of shares.

V. The mortgagee of a ship is entitled to the accruing freight from the time he takes possession. (2 Sp. 775; *Keith v. Burrows*, L. R. 2 Ap. Cas. 636.) A security valid in Equity may be given upon freight to be earned or a cargo to be acquired. (2 Sp. 775.) **607.**

V. Mortgage of a ship.

The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. (*Liverpool Marine Credit Co. v. Wilson*, L. R. 7 Ch. Ap. 507; *Keith v. Burrows*, L. R. 2 Ap. Cas. 636.) **608.**

A legal mortgage of a ship must be in the

TIT. III. form described by the Merchant Shipping  
CAP. III. Act (17 & 18 Vict. c. 104). Prior to the  
SEC. III. stat. 25 & 26 Vict. c. 63, s. 3, an equitable  
mortgage was invalid. (*Liverpool Borough  
Bank v. Turner*, 2 D. F. & J. 502.) But  
by that enactment, "equities may be enforced  
against owners and mortgagees of ships in  
respect of their interest therein, in the same  
manner as equities may be enforced against  
them in respect of any other personal pro-  
perty." **609.**

VI. Pledgor's  
right of  
redemption.

VI. In the case of pledges, if a time for  
redemption is fixed by the contract, still the  
pledgor may redeem it afterwards, if he  
applies to the Court within a reasonable  
time. If no time is specified for the pay-  
ment, the pledgor may redeem it at any time  
during his life, unless he is called upon to  
redeem by the pledgee; and if he fails in so  
redeeming it, his representatives may redeem  
it. (St. § 1032; 2 Sp. 637, 772, 773.) **610.**

VII.  
Pledgee's  
rights.

VII. On the other hand, the pledgee, on  
giving due notice, may sell the pledge with-  
out any decree of sale. (St. § 1033; 2 Sp.  
637, 771.) **611.**

In *Carter v. Wake* (L. R. 4 Ch. D. 605),  
Sir G. Jessel, M.R., held that the pledgee  
had no right to foreclose. **612.**

## SECTION IV.

*Of Liens.*

Liens in Equity are wholly independent of the possession of the property. **613.**

TIT. III.  
CAP. III.  
SEC. IV.

If a consignee accepts a consignment, with express directions to apply it or the proceeds of it in a particular mode, he cannot set up his general lien in opposition to those directions. In such a case only what remains after answering the particular directions can become subject to the general lien. (*Frith v. Forbes*, 4 D. F. & J. 409.) **614.**

Equitable  
lien in  
general.  
General lien  
of a con-  
signee.

The usual way of enforcing a lien in Equity is by a sale of the property to which it is attached. (St. § 1217.) **615.**

The lien of a solicitor on the deeds, books, and papers of his client, for his costs, is not like a lien arising in the case of contract: it has not the character of a pledge or a mortgage: but it is merely a right to withhold the deeds, books, and papers which have come into his possession as solicitor, and not a right to enforce his claim against the client. It prevails as against the representatives of the client, but it is only commen-

Lien of a  
solicitor for  
costs.

TIT. III.  
CAP. III.  
SEC. IV.

surate with the right of the client, and is subject to the rights of third persons as against him: so that a prior incumbrancer cannot be affected by it; and when a mortgagee is paid off, the solicitor of the mortgagee cannot retain the deeds. (2 Sp. 800, 801; *Francis v. Francis*, 5 D. M. & G. 108; *Turner v. Letts*, 7 D. M. & G. 243; see also *Watson v. Lyon*, 7 D. M. & G. 288; and *In re Bank of Hindustan, &c., Ex parte Smith*, L. R. 3 Ch. Ap. 125; *In re Faithfull*, L. R. 6 Eq. 325.) And a solicitor acting both for the mortgagee and the mortgagor in the preparation of a mortgage has no lien on the title deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such lien as against the mortgagor. (*In re Snell*, L. R. 6 Ch. D. 105.) **616.**

But a solicitor has a lien upon a fund realised in a suit, as to so much as may belong to his own client, for his costs of the suit or immediately connected with it; and this is a lien which he may actively enforce. (2 Sp. 802; *Verity v. Wyld*, 4 Drew. 427; *Haymes v. Cooper*, 33 Beav. 431.) **617.**

Lien of a  
joint  
tenant:

If one of two joint tenants of a lease renews for the benefit of both, he will have a

lien on the moiety of the other joint tenant TIT. III.  
CAP. III.  
SEC. IV.  
for a moiety of the fines and expenses: (2  
Sp. 803.) **618.**

A trustee is entitled to a lien on the trust of a trustee  
estate for his expenses. (2 Sp. 803.) **619.**

Annuitants scheduled to a trust deed do of annui-  
tants.  
not acquire any lien upon the trust estate,  
unless they are made parties to the deed.  
(2 Sp. 104.) **620.**

Where a testator gives a legacy to each of Legatee's  
lien.  
his daughters, on condition that she shall  
convey her share of certain real estate, to  
which the daughters were entitled, to the  
sons of the testator to whom he gives his  
residuary personal estate, and the daughters  
convey their shares of the real estate to their  
brothers, but do not obtain payment of their  
legacies, it has been held that the daughters  
are not entitled to any lien on the real estate  
for their legacies, but have a mere personal  
remedy. (*Barker v. Barker*, L. R. 10 Eq.  
438.) **621.**

## CHAPTER IV.

## OF APPORTIONMENT AND CONTRIBUTION.

TIT III.  
CAP. IV.I. Jurisdic-  
tion.

I. IN several cases under these heads, assistance may be had at Law. But even in these cases it may be necessary to resort to Equity instead of proceeding at Law, in order to avoid a multiplicity of suits ; for where there are several parties, as each is only liable to contribute for his own portion, separate actions and verdicts are necessary against each. (St. § 477, 488.) **622.**

II. Two  
classes of  
apportion-  
ment.

II. An apportionment may be made either of a benefit, or of an incumbrance, loss, expense or liability ; and in the case of an apportionment of the latter class, a corresponding contribution is enforced, consequent on such an apportionment. **623.**

Illustra-  
tions of the  
first.

To mention an instance of an apportionment of a benefit, if an apprentice-fee is given, and the master afterwards becomes bankrupt, Equity will decree an apportionment. (St. § 472, 473.) And where portions are payable to daughters at a certain

age or on marriage, and maintenance is to be allowed, payable half-yearly, at specific times, until the portions are due ; if one of the daughters should attain the given age at an intermediate period, the maintenance will be apportioned in Equity. (St. § 479 ; 2 Sp. 462.) **624.**

TIT. III.  
CAP. IV.

On the other hand, with regard to an apportionment of, and contribution towards, an incumbrance, loss, expense, or liability, in the absence of an indication to the contrary, where several estates, or parts of estates, are comprised in one mortgage, and they become vested by devise, descent, or otherwise in several persons, each estate or part of an estate mortgaged must, according to its value, contribute proportionally to keep down the interest or to pay off the principal. (St. § 484.) And so it is with different persons having distinct limited interests in an estate which is under mortgage. (St. § 485 ; 2 Sp. 837.) And as between a tenant for life and a remainder-man under a will, the interest on the testator's debts must be borne by the income as from the day of the testator's death. (*Barnes v. Bond*, 32 Beav. 653.) **625.**

Illustrations of apportionments of the second class.

III. If a tenant in tail in possession pays off an incumbrance on the estate, it will ordinarily be treated as extinguished, and

III. Voluntary discharge of an incumbrance by a tenant in



TIT. III.  
CAP. IV.

tail or by a  
tenant for  
life.

the remainder-man cannot be called upon for a contribution, unless the tenant in tail keeps alive the incumbrance by some suitable assignment, or otherwise manifests his intention to hold himself out as a creditor of the estate in lieu of the mortgagee; because a tenant in tail in possession can make himself absolute owner of the estate: and therefore, if he discharges incumbrances, he is presumed to do so in the character of owner, unless he clearly shows that he intends to become a creditor in respect of such discharge. But the like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated, or to a tenant for life; for, if either of these persons, and especially a tenant for life, pays off an incumbrance, it must be presumed that he means to keep it alive, against the inheritance, for his benefit. But, in both of these cases, the presumption may be rebutted by circumstances which demonstrate a contrary intention. And if a tenant for life pays off a bond debt, it will not be presumed that he meant to keep it alive. (*Morley v. Morley*, 5 D. M. & G. 610; St. § 486; 2 Sp. 308, 344, 345, 843.) **626.**

IV. Com-  
pulsory dis-  
charge of  
incum-  
brances.

IV. With respect to the compulsory discharge of incumbrances, the modern rule is

this: that the tenant for life shall contribute, beyond the interest, in proportion to the benefit he derives from the liquidation of the debts, and the consequent cessation of interest, which of course will much depend on his age, and the computation of the value of his life. If the estate is sold to discharge incumbrances (as the incumbrancer may insist that it shall), the surplus which remains after discharging the incumbrance is to be applied as follows: the income thereof is to go to the tenant for life during his life; and then the whole capital is to be paid over to the remainder-man or reversioner. (St. § 487; 2 Sp. 551, 841.) **627.**

TIT. III.  
CAP. IV.

V. A tenant for life is bound to keep down interest which has accrued during his own time, so far as the rents and profits will extend. But if there are any arrears which accrued during the life of a preceding tenant for life, and such arrears cannot be recovered from his estate, they are primarily a charge upon the inheritance. (St. § 488, 1028 a; 2 Sp. 551; *Dixon v. Peacock*, 3 Drew. 288, 292; *Sharshaw v. Gibbs*, Kay, 333; Tudor's Lead. Cas. on R. P. 2nd ed. 82 *et seq.*) **628.**

V. Keeping  
down the  
interest on  
incum-  
brances.

Where a tenant for life of an estate, subject to a charge bearing interest, pays the

TIT. III.  
CAP. IV.

interest, although the rents and profits are insufficient for that purpose, he cannot make himself an incumbrancer on the estate for the excess in his payments, if he has not given to the remainder-man any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance. (*Lord Kensington v. Bouverie*, 7 H. L. Cas. 557.)

### 629.

A tenant in tail in possession, if of full age, cannot be compelled by the remainder-man or reversioner to pay the interest ; because he can make himself absolute owner of the estate ; and even if the remainder-man or reversioner ultimately takes, still, instead of having any just ground of complaint that the interest has not been kept down, he has cause to be grateful to the tenant in tail for not barring the remainder or reversion. If, however, such a tenant in tail does pay the interest, his personal representatives have no right to be allowed the sum so paid, as a charge on the estate ; because he is supposed to have kept down the interest, as owner, for the benefit of the estate. (St. § 488.) **630.**

If a tenant in tail is an infant, his guardian or trustee will be required to keep down the interest : because the infant cannot of

his own free will bar the remainder or reversion. (St. § 488, note.) **631.**

TIT. III.  
CAP. IV.

VI. Where leaseholds for years or for lives are settled upon several persons in succession, the rule, in the absence of any express direction, is, to apportion the charges for the renewal of leaseholds between the tenant for life and the remainder-man, in proportion to the enjoyment they have of the renewed lease. (2 Sp. 545, 546.) **632.**

VI. Charges  
of renewal  
of lease-  
holds.

VII. Another case of apportionment and contribution arises in regard to sureties. Originally, it seems to have been questioned whether contribution between sureties, unless founded on some positive contract between them, could be enforced at Law. And although there is now no doubt that it may, yet the legal jurisdiction now assumed in no way affects that which belongs to Equity. (St. § 495, 496; *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 2nd ed. 78 *et seq.*) The contribution thus enforced is not grounded on mutual contract, express or implied, but on principles of natural justice. (St. § 493.) **633.**

VII. Contri-  
bution  
between  
sureties.

If one surety, on the default of the principal, is compelled to pay the whole sum of money, or to perform any other obligation for which all became bound, he can oblige

Where such  
contribu-  
tion is  
enforced.

TIT. III.  
CAP. IV.

each of his co-sureties, and the representatives of any deceased surety, to contribute, whether the sureties are jointly and severally bound, or only severally, unless there is an express or implied contract to the contrary, and whether their suretyship arises under the same instrument or under different instruments, either executed with his knowledge or not, if all the instruments are primary concurrent securities for the same debt. (See St. § 492, 495, 497, 498 ; 2 Sp. 843 ; *Whiting v. Burke*, L. R. 10 Eq. 539 ; 6 Ch. Ap. 342.) But if the instrument is intended to be only subsidiary to and a security for the other in case of a default in payment, and not to be a primary concurrent security, the surety in the subsequent bond would not be compelled to aid those in the other by any contribution. (St. § 498 ; 2 Sp. 844.) **634.**

What is the quantum.

The contribution will generally be equal ; but if there is a contract express or implied to the contrary, it will be otherwise. (St. § 498 ; 2 Sp. 844.) And if there are several sureties, and one of them is insolvent, and another pays the debt, he can recover from the solvent surety or sureties, as much as such solvent surety or sureties would have had to pay if the insolvent had never under-

taken the office of surety. (St. § 496 ; 2 Sp. <sup>TIT. III.</sup> 844 ; *Hitchman v. Stewart*, 3 Drew. 271.) <sup>CAP. IV.</sup> ---

And when there are several distinct bonds, with different penalties, and a surety on one bond pays the whole, the contribution is in proportion to the penalty of their respective bonds. (St. § 497.) **635.**

VIII. Another instance of apportionment <sup>VIII.</sup> and contribution is that of general average, <sup>General average.</sup> which is a general contribution that is to be made by all parties in interest toward a loss or expense, which, in the course of a voyage, is voluntarily sustained or incurred for the benefit of all ; as where goods are thrown overboard to lighten the ship. The contribution is confined to the property saved thereby, including the ship, the freight, and the cargo. (St. § 490, 491 ; *Birkley v. Presgrave*, Tudor's Lead. Cas. Merc. Law, 2nd ed. 83 *et seq.*) **636.**

## CHAPTER V.

## OF PARTNERSHIP.

TIT. III.  
CAP. V.

I. Jurisdic-  
tion.

I. COURTS OF EQUITY exercise a full concurrent jurisdiction with Courts of Law in all matters of partnership; and, indeed, practically speaking, they exercise an exclusive jurisdiction over the subject in all cases of any complication or difficulty. (St. § 683. See, on this subject, *Crawshay v. Maule*, and *Waters v. Taylor*, Tudor's Lead. Cas. Merc. Law, 2nd ed. 310, 329 *et seq.*) **637.**

II. Specific  
perform-  
ance of an  
agreement  
to enter into  
partnership.

II. In general a Court of Equity will not enforce a specific performance of a contract to enter into a partnership which may be dissolved instantly at the will of either party, since that would ordinarily be useless. Nor will it ordinarily decree a specific execution of an agreement to enter into a partnership for a certain time. (St. § 666; *Scott v. Rayment*, L. R. 7 Eq. 112.) But after a partnership has commenced, the Court will carry into effect the articles of partnership,

Carrying  
into effect  
the articles  
of partner-  
ship where  
a partner-

unless there is an entirely adequate remedy at Law. An exception, however, occurs, where there is an agreement, that, in case of any dispute, the same shall be referred to arbitration; for Courts of Equity will not enforce such an agreement, but will leave the parties to their own pleasure. (St. § 667, 670.) **638.**

TIT. III.  
CAP. V.

ship has  
commenced

Where partners, after the expiration of the time fixed by the articles for the duration of the partnership, continue to carry on business without altering the terms, it will be deemed a partnership at will, regulated by the articles so far only as they are consistent with a partnership at will. (*Clark v. Leach*, 32 Beav. 14.) **639.**

Application  
of articles  
after cesser  
of term.

III. A partnership may be dissolved, in the ordinary way, by death; by the act of the parties; by effluxion of time; and in other ways. (See *Smith's Manual of Com. Law*, 8th ed. par. 643.) But Courts of Equity will dissolve the partnership before the regular time, in case, by reason of the ill-feeling between the partners or other circumstances, it is impracticable to carry on the undertaking at all, or at least according to the stipulations of the articles, or beneficially; or in case of the insanity, permanent incapacity, or gross misconduct of one of

III. Dissolu-  
tion  
decreed.



**TIT. III.**  
**CAP. V.**

the partners. (St. § 673; *Harrison v. Tenant*, 21 Beav. 482; *Jennings v. Baddeley*, 3 K. & J. 78; *Baxter v. West*, 1 Dr. & Sm. 173; *Watney v. Wells*, 30 Beav. 56; *Essell v. Hayward*, 30 Beav. 158; *Rowlands v. Evans*, 30 Beav. 302; *Leary v. Shout*, 33 Beav. 582.) And a partnership will also be dissolved at the instance of a partner who was induced to enter into it on a false representation. (*Rawlins v. Wickham*, 1 Gif. 355.) **640.**

**IV. Dissolu-  
tion pro-  
hibited.**

IV. On the other hand, in the case of a partnership existing during the pleasure of the parties, with no time fixed for its renunciation, Equity will grant an injunction against a dissolution, if a sudden dissolution is about to be made in ill-faith, and would work irreparable injury. (St. § 668; *Lindley*, 179.) **641.**

**V. Injury  
prevented.**

V. An injunction will be granted to prevent a partner from doing acts injurious to the partnership. (St. § 669.) **642.**

**VI. Account  
and  
manager or  
receiver.**

VI. Where a dissolution has taken place, not only will an account be decreed, but, if necessary, a manager or receiver will be appointed to close the business, and make sale of the property. (St. § 672.) But a Court of Equity is not inclined to decree an account, except under special circum-

stances, if there is no actual or contemplated dissolution, so that all the affairs of the partnership may be wound up. (St. § 671.)

TIT. III.  
CAP. V.

### 643.

VII. On a dissolution, one of the co-owners of leaseholds cannot insist on a partition, but the whole must be sold. (*Wild v. Milne*, 26 Beav. 504.)

VII. Parti-  
tion.

### 644.

VIII. A partner using any portion of the partnership stock, after a dissolution, for any purpose other than for the winding up of the concern, will be treated as a trustee for the others, or their representatives, of the profits he may have made thereby. (2 Sp. 208.)

VIII. Using  
stock after  
dissolution.

### 645.

After a dissolution, no interest is payable between partners merely on the ground that they have still remaining in the concern unequal shares of capital, on which during the continuance of the partnership they were entitled, either by express agreement or by their course of dealing, to have interest credited, with or without rests. (*Barfield v. Loughborough*, L. R. 8 Ch. Ap. 1.)

Interest  
after dis-  
solution.

### 646.

IX. Real estate bought and held for the purposes of a partnership in trade, as a part of the stock in trade, will be considered in Equity, although not at Law, as personal estate to all intents and purposes, whatever

IX. Real  
estate.

**TIT. III.**  
**CAP. V.**

may be the form of the conveyance ; so as to be subject to all the equitable rights and liabilities of the partners and their creditors ; and so as to pass to the personal representatives and distributees, on the death of a partner, except, perhaps, where there is a clear expression of the deceased partner that it shall go to his heir-at-law beneficially, or the partners have stipulated that freehold lands purchased by them shall descend to their heirs-at-law beneficially. (Smith's Merc. Law, 6th ed. 179 ; St. § 674 ; *Darby v. Darby*, 3 Drew. 495 ; but see 2 Sp. 208-211.) But where the land, and not the trade, is the principal object, and the trade is merely ancillary to the beneficial enjoyment of the land, or a part of it, this doctrine will not apply ; so that if one of the co-owners dies intestate, his share in the land will pass to his heir, and not to his legal personal representative. (*Steward v. Blake-way*, L. R. 6 Eq. 479 ; 4 Ch. Ap. 603.)  
**647.**

**X. Rights  
of joint  
creditors.**

X. During the partnership, the joint creditors have no lien, until they have obtained a judgment ; and before they have issued and registered process of execution, they cannot prevent the partners from effectually transferring the property by a *bonâ fide*

alienation. (See 2 Sp. 212; stat. 23 & 24 Vict. c. 38, s. 1.) **648.** TIT. III.  
CAP. V.

XI. The creditors of the partnership have a right to the payment of their debts out of the partnership funds, before the private creditors of either of the partners; although, at Law, this is generally disregarded. On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything; although, at Law, a joint creditor may proceed directly against the separate estate. (St. § 675; 2 Sp. 213; *Ex parte Ruffin*, and *Ex parte Rowlandson*, Tudor's Lead. Cas. Merc. Law, 2nd ed. 387, 407; *Lodge v. Prichard*, 4 Gif. 294; 1 D. J. & S. 610.) **649.** XI. Priority as between joint and separate creditors.

XII. The partnership creditors may in the first instance proceed against the executors or administrators of a deceased partner, leaving them to their remedy over against the surviving partner, or *vice versa*; because every joint debt is joint and several. (St. § 676; 2 Sp. 213.) **650.** XII. Creditors may proceed against a deceased partner's estate in the first instance.

A similar rule applies to all cases where there is a joint loan to several persons who are not partners. (St. § 676.) **651.** Similar rule applies to other joint debtors.

## CHAPTER VI.

### OF CERTAIN SPECIAL ADJUSTMENTS IN THE CASE OF DEBTORS AND CREDITORS.

#### SECTION I.

#### *Of the Marshalling of Securities.*

**TIT. III.** WE have already had occasion to consider  
**CAP. VI.** the marshalling of assets in cases of Admin-  
**SEC. I.** istration, to which the present topic bears  
**General** a close analogy. The general doctrine is  
**doctrine.** that if a creditor has a lien on or interest in  
two funds belonging to one person, and  
another creditor has a lien on or interest in  
one only of the funds, and the claims of  
both could not be satisfied if the former  
were to resort to the fund in which alone  
the latter is interested; there the latter  
creditor can, in Equity, compel the former  
to resort to the other fund in the first in-  
stance for satisfaction, unless that would  
operate to the prejudice of the party entitled  
to the double fund or the common debtor.

(St. § 633, 642; 2 Sp. 834; 2 Lead. Cas. **652.** TIT. III.  
CAP. VI.  
SEC. I.  
Eq. 2nd ed. 79 *et seq.*)

But although the different securities of one and the same common debtor will be marshalled so as to satisfy the different creditors, yet where two or more persons are under a joint obligation to one creditor, and one of them is also indebted to another creditor, Equity will not compel the joint creditor to satisfy his claim by proceeding against the joint debtor who is only indebted to such joint creditor, so as to leave the other joint debtor's property for the several creditor; unless it appears that the joint debt ought in fact to be paid by the debtor who is only indebted to the joint creditor, or that there is some other supervening equity. (St. § 642-5.) For, in general, it would seem that the several creditor can have no equity to counterbalance the right of the debtor who is only jointly indebted to the joint creditor, to have a contribution from the other joint debtor. **653.**

No marshalling where one of two joint debtors is also a several debtor of another creditor.

## SECTION II.

*Of the Mutual Right to the Benefit of Securities between a Creditor and Sureties; and of the Release of Sureties.*

**TIT. III.** Sureties are entitled to the benefit of all  
**CAP. VI.** securities which have been taken by any of  
**SEC. II.** their co-sureties to indemnify themselves  
 against their liability. (St. § 499.) **654.**

Courts of Equity have also held that on payment by the sureties to the creditor of the debt due from the principal, they are entitled to the full benefit of all securities taken by the creditor, at or after the date of the contracts of suretyship, whether the surety has notice of them or not, and whether of a legal or of an equitable nature, which are collateral to or other than the original principal security whereby the debt is evidenced, or which continue to exist, and do not get back, on payment, to the principal debtor. And the surety is so entitled, not only against the principal debtor, but also against all persons claiming under him; as, for instance, against a subsequent mortgagee of the debtor, with notice of a

prior charge paid off by the surety. Thus, if at the time when the bond of the principal and surety is given, a mortgage is made by the principal, to be an additional security for the debt; there, if the surety pays the debt, he will be entitled to an assignment of the mortgage, and to stand in the place of the mortgagee; and as the mortgagor cannot get back his estate without a re-conveyance, the assignment and security will remain an effectual security in favour of the surety. But, until recently, the surety could not obtain an assignment of the bond itself; nor could he insist on an assignment of a judgment, after he had paid off the debt on the judgment. (St. § 499, 499 b, 499 c, and note, 638; *Pearl v. Deacon*, 24 Beav. 186; 1 D. & J. 461; *Pledge v. Buss*, Johns. 663, and remarks there on *Newton v. Chorlton*, 10 Hare, 646; *Goddard v. Whyte*, 2 Giff. 449; *Drew v. Lockett*, 32 Beav. 499; *Strange v. Fooks*, 4 Gif. 408.) It is enacted, however, by the stat. 19 & 20 Vict. c. 99, s. 5, that "every person who, being a surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt, or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, speciality, or other

TIT. III.  
CAP. VI.  
SEC. II.

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TIT. III. security which shall be held by the creditor,  
CAP. VI.  
SEC. II. in respect of such debt or duty, whether such  
judgment, speciality, or other security shall  
or shall not be deemed at Law to have been  
satisfied by the payment of the debt or per-  
formance of the duty ; and such person shall  
be entitled to stand in the place of the  
creditor," &c. (1 Lead. Cas. Eq. 2nd ed.  
87-91.) **655.**

On the other hand, if a surety has a counter  
bond or security from the principal, the  
creditor will be entitled to the benefit of it,  
and may in Equity reach such security to  
satisfy his debt. (St. § 502, 638.) **656.**

In Equity, whatever act is a discharge of  
the principal, is also a discharge of the surety,  
though the surety be not released at Law.  
(1 Pres. Shep. T. 71 ; *Webb v. Hewitt*, 3 K.  
& J. 438.) **657.**

Where a person becomes a surety upon the  
faith of another also agreeing to enter into  
the obligation, the former has a right to be  
relieved in Equity, on the ground that the  
instrument has not been executed by the  
latter. (*Evans v. Bremridge*, 8 D. M. & G.  
100.) **658.**

## SECTION III.

*Of Set-off or Counterclaim.*

It is not proposed to go into this subject, regarded as a matter of practice or procedure depending on Statutes or Orders ; but simply to notice a few points relating to it, when viewed as a matter of Equity Jurisprudence before the Judicature Acts, by which the relative remedies of persons having counter-claims are materially affected. **659.**

As to connected accounts of debts and credits, the balance only was recoverable, whether at Law or in Equity. (St. § 1434.) **660.**

But it would seem that Courts of Equity, in virtue of their general jurisdiction, were accustomed to grant relief in all cases where there was a mutual credit between the parties, founded at the time on the existence of some debt due by the crediting party to the other (St § 1435 ; *Cavendish v. Geaves*, 24 Beav. 163), or where peculiar equities intervened. (St. § 1437 a.) And where there were cross demands, of such a nature that, if both were recoverable at Law, they

TIT. III.  
CAP. VI.  
SEC. III.

Connected  
accounts.

Independ-  
ent debts  
or demands.

TIT. III. would be the subject of a set-off, there, if  
 CAP. VI.  
 SEC. III. either of the demands was a matter of equitable jurisdiction, the set-off would be enforced in Equity. (St. § 1436 a.) But a set-off was ordinarily allowed in Equity in those cases only where the party seeking the benefit of it could show some equitable ground for being protected against the demand of the other party. The mere existence of cross demands would not be sufficient. *A fortiori*, a Court of Equity would not interfere, on the ground of an equitable set-off, to prevent a person from recovering a sum awarded to him for damages for a breach of contract, merely because there is an unsettled account between him and the other party in respect to dealings arising out of the same contract, where it could not be assumed that the balance would be found to be in favour of the latter. (St. § 1436, and note ; and see *Phipps v. Child*, 3 Drew. 709 ; *Fisher v. Baldwin*, 11 Hare, 352 ; *Jenner v. Morris*, 1 Dr. & Sm. 334 ; *Smee v. Baines*, 29 Beav. 661.) **661.**

Where one debt is joint and the other separate.

Equity, following the Law, would not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt ; unless there was a joint credit given on account of the separate debt, or

there were other special circumstances to justify such an interposition. (St. § 1437; *Piercy v. Fynney*, L. R. 12 Eq. 69.) **662.**

TIT. III.  
CAP. VI.  
SEC. III.

Except under special circumstances, Courts of Equity have never allowed cross demands existing in different rights to be set the one against the other. And therefore an executor and the trustee of a legacy, who is also the residuary legatee, and had become a creditor of a person who was the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy to which the husband, as such administrator, was entitled. (*Freeman v. Lomas*, 9 Hare, 109; *Middleton v. Pollock*, L. R. 20 Eq. 29, 515.) And where a creditor of an intestate purchases part of the intestate's goods from his administrator, the creditor cannot set off the sum at which he purchased the goods against a debt due to him from the intestate at the time of his decease. (*Lambarde v. Older*, 17 Beav. 542.) **663.**

Demands in  
different  
rights.

## CHAPTER VII.

OF CERTAIN MISCELLANEOUS CASES OF  
ACCOUNT.TIT. III.  
CAP. VII.

I. Agency.

I. It is the duty of an agent to keep regular accounts and vouchers. (See remarks of Sir John Romilly, M.R., in *Stainton v. The Carron Company*, 24 Beav. 353.) And if he does not, he will not be allowed the compensation which would otherwise belong to his agency. And if he mixes up his principal's property with his own, he is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated, both at Law and in Equity, as the property of the principal. (St. § 468.) **664.**

II. Mesne  
profits.

II. In the ordinary case of mesne profits, where aid was clearly afforded at Law, Courts of Equity will not interpose. (St. § 511.) Wherever relief is given in Equity, it will be found that there is some peculiar equitable ground for interference; such as fraud, acci-

dent, or mistake, the want of a discovery, TIT. III.  
CAP. VII. some impediment at Law, the existence of a constructive trust, or the necessity of interposing to prevent multiplicity of suits. (St. § 509–514.) **665.**

III. In cases of legal waste, relief is ordinarily at Law. (St. § 515–518.) If the waste is equitable only, of course a remedy lies in Equity (*a*). (St. 515, note.) **666.** III. Waste.

IV. Matters of account also arise in regard to tithes and moduses. Wherever the right to tithe is clearly established, an account is consequent. But if the right is disputed, it must first be established, before an account will be decreed. (St. § 519.) For some years past, however, tithes have been commuted for tithe rent-charges, under the stat. 6 & 7 Will. IV. c. 47, and subsequent Acts. **667.** IV. Tithes and moduses.

(*a*) On this subject, see the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (3). *Infra*, page 564.

## CHAPTER VIII.

### OF DAMAGES AND COMPENSATION.

TIT. III.  
CAP. VIII.

I. Old rule  
as to  
damages or  
compensa-  
tion to a  
plaintiff.

Stat. 21 & 22  
Vict. c. 27.

I. IT would seem that prior to the stat. 21 & 22 Vict. c. 27, damages or compensation were decreed in favour of a plaintiff in Equity, only as incident to other relief, sought by the bill and actually granted, or where there was no adequate remedy at Law, or where some peculiar equities intervened. (St. § 724, 798, 799.) But by that statute (s. 1) it was enacted, that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages may be assessed in such

manner as the Court shall direct." (*Johnson v. Wyatt*, 2 D. J. & S. 18; *Middleton v. Greenwood*, 2 D. J. & S. 142.) **638.**

TIT. III.  
CAP. VIII.

II. Compensation is often given to a defendant, on the principle that he who seeks equity must do equity. Thus, if a plaintiff in Equity seeks the aid of the Court to enforce his title to land against an innocent person, who has made improvements on it, supposing himself to be the absolute owner thereof, that aid will be given only on the terms that the plaintiff shall make a compensation to such innocent person proportionate to the benefit which will be received from those improvements. (St. § 799 a.) **669.**

II. Compensation to a defendant.

III. With regard to penalties and forfeitures for breach of conditions and covenants, there was originally no relief but in Equity; and although, by several statutes, relief may now be had at Law in a great variety of cases, yet the original jurisdiction in Equity still remains. (St. § 1301; *Peachy v. Duke of Somerset*, 2 Lead. Cas. Eq. 2nd ed. 895 *et seq.*) **670.**

III. Jurisdiction to relieve against penalties and forfeitures.

Where a penalty or forfeiture appears to have been inserted merely to secure the performance of some act, or the enjoyment of some right or benefit, Equity regards the

Where such relief is afforded.



TIT. III.  
CAP. VIII.

performance of such act, or the enjoyment of such right or benefit, as the substantial object of the party interested therein; and if a compensation can be made for the non-performance or want of enjoyment thereof, it will relieve against the penalty or forfeiture, by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained. (See St. § 1314, 1320.)

### 671.

Amount of compensation in such cases.

If a compensation can be made, and the penalty is to secure the mere payment of a sum of money, the party will be relieved on paying the principal and interest. If it is to secure the performance of some other act, the Court will ascertain the amount of damages, and grant relief on payment thereof. (St. § 1314.)

### 672.

Such relief is justly granted.

Although it may be urged that, in such cases as these; it was the folly of the party to make such a stipulation, yet the folly of one man cannot authorize the other to commit an act of gross oppression, or oblige the former to suffer a loss wholly disproportionate to the injury received. (St. § 1316.) And, although, in some cases, from peculiar circumstances, which cannot be taken into account, the compensation awarded may not amount to an adequate compensation, yet

that is no solid objection against the interference of Courts of Equity; for a great injury is always prevented by such interference; whereas the mischief caused thereby is only occasional; and all general rules must work occasional mischiefs. (St. § 1316, note.)

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CAP. VIII.

### 673.

A stipulation, that if instalments be not punctually paid, the whole sum shall be payable at once, is not to be deemed of the nature of a penalty. (*Sterne v. Beck*, 1 D. J. & S. 595.) Nor is a reservation of a right to have full payment of money actually due at the date of an existing contract, if there should be a failure to pay a smaller sum on a day certain. (*Thompson v. Hudson*, L. R. 4 H. L. 1.)

### 674.

IV. Courts of Equity will not relieve in cases of liquidated damages, which occur where the parties have agreed that in case one party shall do or omit a certain act, the other party shall receive a certain sum, as the just amount of the damage sustained by such act or omission, and where the sum so agreed to be paid is not grossly disproportionate to the nature or extent of the injury. If the sum is so disproportionate, and it is in reality penal, although it may assume the disguise of liquidated damages, a Court of

IV. No relief against liquidated damages, where they are really such.

**TIT. III.** Equity will treat it as a penalty, and relieve  
**CAP. VIII.** against it accordingly. (St. § 1318.) **675.**

V. Where relief is granted as to a breach of covenant or condition.

V. In the case of a breach of a covenant to pay rent, Equity will relieve, even where the term is gone at Law by reason of the landlord's entry by virtue of a clause of re-entry; for that is deemed to be a mere security for the payment of the rent. (St. § 1315, and note to § 1323.) But no relief will be granted in Equity in case of forfeiture for the breach of any covenant other than a covenant to pay rent, unless on the ground of accident, mistake, or fraud; for it has been considered that even where the damages are capable of being ascertained, the jurisdiction of Equity in giving relief is a dangerous jurisdiction, and rarely works a real compensation. (St. § 1320-6; *Gregory v. Wilson*, 9 Hare, 689. The marginal note, as to "accidental" neglect, appears to be wrong.) (a) **676.**

VI. Relief not granted against statutory penalties or forfeitures.

VI. And Equity will not mitigate any penalty or a forfeiture imposed by Statute; for that would be in contravention of the direct expression of the legislative will. (St. § 1326.) **677.**

(a) See the stat. 22 & 23 Vict. c. 35, ss. 4-6, and 23 & 24 Vict. c. 126, s. 2, as to relief against forfeiture for breach of a covenant or condition to insure.

VII. On the other hand, it is a uniform rule in Equity never to enforce either a penalty or a forfeiture. Therefore Courts of Equity will never aid in the divesting of an estate, for a breach of a covenant, on a condition subsequent. (St. § 1319; and on the subject of enforcing a penalty, see *Thompson v. Hudson*, L. R. 2 Eq. 612; 2 Ch. Ap. 255; 4 H. L. 1.) **678.**

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VII. A  
penalty or  
forfeiture  
never en-  
forced.

## CHAPTER IX.

### OF ELECTION.

**TIT. III.** **ELECTION** is the choosing between two rights,  
**CAP. IX.** by a person who derives one of them under  
**Definition.** an instrument in which a clear intention  
appears that he should not enjoy both.  
**679.**

Where elec-  
tion arises  
at Law.

The instances in which Courts of Law have put a person to his election are cases of title which are technically incapable of simultaneous assertion, by reason of their inconsistency; as in the case of a contemporaneous estate for life and in tail in the same land, or a claim of a tenant under and against his landlord; or a claim to dower both in the land taken and the land given in exchange. **680.**

Where elec-  
tion arises  
in Equity.

The doctrine of election arises in Equity in cases where a grantor, or, more commonly, a testator, gives away, either knowingly or by mistake, that in which he has no interest, or the whole of that in which another person besides himself has an interest, and in the

same instrument makes a gift to the owner of the property so given away, or to the person entitled to such interest. In such cases the owner of such property, or the person entitled to such interest, cannot both take the gift and retain his own property or interest; but if he takes the gift, he must resign his own property or interest. On the other hand, if he elects to hold his own property or interest, or, as the phrase is, if he elects against the instrument, he cannot have the gift; or at least he cannot have the entire gift without compensating the party whom he has disappointed by electing to take his own property. Equity, in not suffering the disposition by which such gift is made to enure to the benefit of the person so electing against the instrument, will not render that disposition inoperative, but will make it the means of effectuating that intention of the author of the instrument which such person has frustrated by so electing to retain his own property or interest: for Equity will treat such gift, or at least a part of it, as a trust in the donee or devisee, the person so electing, for the benefit of the party disappointed by such person's refusing to give up his own property or interest. (See St. § 1077, note,

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and 1081-4, 1086, 1088, 1089, 1093; 2 Sp. 586, 587, 588, 601-4; *Noys v. Morlaunt*, and *Streatfield v. Streatfield*, 1 Lead. Cas. Eq. 2nd ed. 271 *et seq.*; *Swan v. Holmes*, 19 Beav. 471; *Wintour v. Clifton*, 21 Beav. 447; 8 D. M. & G. 641; *Stephens v. Stephens*, 3 Drew. 697; *Usticke v. Peters*, 4 K. & J. 437; *Anderson v. Abbott*, 23 Beav. 457; *Grosvenor v. Durston*, 25 Beav. 97; *Fitzsimons v. Fitzsimons*, 28 Beav. 417; *Honywood v. Forster* (No. 2), 30 Beav. 14; *Howells v. Jenkins*, 2 Johns. & H. 706; 1 D. J. & S. 617; *Whitley v. Whitley*, 31 Beav. 173; *Miller v. Thurgood*, 33 Beav. 496; *Grissell v. Swinhoe*, L. R. 7 Eq. 291; *Coutts v. Acworth*, L. R. 9 Eq. 519; *Cooper v. Cooper*, L. R. 6 Ch. Ap. 15; *Wilkinson v. Dent*, L. R. 6 Ch. Ap. 339; *Middleton v. Windross*, L. R. 16 Eq. 212; *Rogers v. Jones*, L. R. 3 Ch. D. 688.) Indeed, the doctrine of election can never be applied where an election is made contrary to the instrument, unless the interest that would pass by it is of that freely disposable nature that it can be laid hold of to compensate the party who suffers by the exercise of such election against the instrument. Thus, where there is a fund subject to the appointment of a father amongst his children, and the

father appoints a part to some of his children, and the other part to persons TIT. III.  
CAP. IX. not objects of the power; any child who is an appointee may both take his appointed share and also claim his share of the improperly appointed portion, as in default of appointment. And an appointee, who is also a legatee, is not bound to elect between his legacy and giving effect to a trust engrafted on the appointment in favour of persons not objects of the power, but such trust is void. But if there is a power to appoint to two, and the donee of the power appoints to one only and gives a legacy to the other, he cannot claim the legacy and also dispute the validity of the appointment. (2 Sp. 520; *In re Fowler's Trust*, 27 Beav. 362; *Woolridge v. Woolridge*, Johns. 63; *Churchill v. Churchill*, L. R. 5 Eq. 44.) **681.**

*Prima facie*, it is not to be supposed, nor must it be proved by extrinsic evidence, that a testator disposes of that which is not his own, so as to raise a case of election. It must appear on the will itself, by plain demonstration or by necessary implication. (2 Sp. 592, 593, 595; *Wintour v. Clifton*, 21 Beav. 447; 8 D. M. & G. 641; *Miller v. Thurgood*, 33 Beav. 496.) **682.**



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The doctrine of election applies even where, in a will not within the Inheritance Act, 3 & 4 W. IV. c. 106, s. 3, a devise of an estate is made to the testator's heir, and the heir, according to the old rule, takes such estate by descent, and not by purchase, and, by the same will, the testator devises to another person an estate belonging to the heir, over which the testator had no disposing power. (St. § 1094; 2 Sp. 589; *Schroder v. Schroder*, Kay, 578; *Hance v. Truwhitt*, 2 Johns. & H. 216.) And the doctrine is equally applied to all interests, whether immediate or remote, vested or contingent, of value or of no value, and whether in real or personal estate. (St. 1096; 2 Sp. 588.)  
**683.**

The same doctrine of election also arises in cases where it was apparently a testator's intention to dispose of all the property he might have at the time of his death, and the heir, who is a devisee under the will, claims property, which was purchased subsequently to the will, and which consequently, under the old law, did not pass by the will, but was intended to pass to another person under the general words of the will. (St. § 1094; *Schroder v. Schroder*, Kay, 578.)  
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And where a testator devises all the residue of his real estate situate in any part of the United Kingdom or elsewhere, and he has real estate in Scotland as well as in England, and his heir takes the Scotch lands, by descent, from want of an instrument *inter vivos* from which the testamentary instrument might derive its effect, the heir will be put to his election. (*Orrell v. Orrell*, L. R. 6 Ch. Ap. 302.) **685.**

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It has been held that the doctrine of election does not apply to an instrument which was valid at the time of execution as to all the property comprised in it, but was rendered inoperative as to some of the property by subsequent events. (*Blaklock v. Grindle*, L. R. 7 Eq. 215.) **686.**

According to the preponderance of authority and principle, a person electing against a will does not forfeit the whole of the benefit intended for him, where the value of the gift exceeds that of his own property or interest; but he is only obliged to compensate in value the claimant whom he has disappointed by refusing to give up his own property or interest. (St. § 1085; 2 Sp. 601-4.) For a Court of Equity, interfering to control his legal rights for the purpose of executing the intention of the

**TIT. III.**  
**CAP. IX.**

testator, is justified in its interference so far only as that purpose requires. (St. § 1085, note.) **687.**

Election as  
to one  
benefit.

A person may decline one benefit given him by a will, such as a legacy charged with a portion, without being precluded from taking another benefit by the same will; unless it is fairly inferable, from the nature of the different benefits, that he should either take all or reject all. (St. § 1081; see 2 Sp. 591.) **688.**

Election in  
the case of a  
settlement.

Election may also arise where a person attempts to claim both under and in opposition to a settlement. It is a rule that a person will not be allowed to take under and against the same instrument. (*Anderson v. Abbott*, 23 Beav. 457; *Mosley v. Ward*, 29 Beav. 407; *Brown v. Brown*, L. R. 2 Eq. 485; *Codrington v. Lindsay*, L. R. 8 Ch. Ap. 578, 593; 7 H. L. 854.) **689.**

Election  
need not be  
made in  
ignorance of  
circum-  
stances.

The party is not bound to make an election till all the circumstances are known. And if he should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him. And he is entitled, in order to make an election, to have a discovery, and all the accounts taken, in order

to ascertain the real state of the fund. TIT. III.  
CAP. IX.  
(St. § 1098; 2 Sp. 598; *Wintour v. Clifton*,  
21 Beav. 447.) **690.**

Election by conduct must be by a person who has positive information as to his rights to the property, and with this knowledge really means to give that property up. (*Wilson v. Thornbury*, L. R. 10 Ch. Ap. 239.) **691.**

An election may be presumed from a long Election  
presumed. acquiescence or from other circumstances. (St. § 1097; 2 Sp. 598–600; *Worthington v. Wiginton*, 20 Beav. 67.) Remaining in possession of two estates held under titles not consistent with each other, affords no conclusive proof of the kind. (*Spread v. Morgan*, 11 H. L. Cas. 588.) **692.**

The doctrine of election is not of the nature of a positive rule of law which a person is bound to know. And therefore in order to infer an election, it is necessary to show that the person who ought to elect was aware of the doctrine. (*Spread v. Morgan*, 11 H. L. Cas. 588.) **693.**

The doctrine of election is not applied in the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claim against other funds disposed of by the will; for a creditor No election  
in the case  
of creditors

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**CAP. IX.**

claims not as a mere volunteer, but for a valuable consideration, and *ex debito justitiæ*. (St. § 1092 ; 2 Sp. 592.) **694.**

Gift under  
mistake.

Where a testator gives a much larger property to one child, under the mistaken impression that such child did not take under the testator's marriage settlement, he is not bound to elect between his interest under the settlement and the gift by will. (*Box v. Barrett*, L. R. 3 Eq. 244.) **695.**

Disability.

Where the person bound to elect labours under any disability, as infancy or coverture, the Court will consider whether it will be most beneficial for such person to take under or against the will or deed, and will decree accordingly. (2 Sp. 587.) **696.**

Persons  
having  
separate  
rights of  
election as  
next of kin  
of a person  
who died  
without  
electing.

Where a person, who had a right of election, dies intestate, without having exercised it, each of his or her next of kin has a separate right of election ; so that neither the election of the majority nor of the heir or administrator will bind the others. (*Fytche v. Fytche*, L. R. 7 Eq. 494.) **697.**

## CHAPTER X.

## OF SATISFACTION.

SATISFACTION may be defined to be the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some claim which the donee has upon the donor. (See St. § 1099–1101, 1106; *Ex parte Pye*, 2 Lead. Cas. Eq. 2nd ed. 303 *et seq.*; *Samuel v. Ward*, 22 Beav. 347; and references *infra*.) **698.**

TIT. III.  
CAP. X.

Definition.

Equitable questions of satisfaction usually arise in three classes of cases. **699.**

Where  
satisfaction  
arises.

I. In cases of portions secured by a marriage settlement. **700.**

II. In cases of portions given by a will, and an advancement of the donee afterwards in the testator's lifetime. **701.**

III. In cases of legacies to creditors. (St. § 1109.) **702.**

In all these classes of cases, where the satisfaction is a matter of presumption, that

Satisfaction  
resting on  
presump-  
tion may be  
rebutted.

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CAP. X.

I. As to  
portions  
secured by  
settlement.

presumption may be rebutted, either by intrinsic evidence derived from the will itself, or by extrinsic evidence, as by declarations of the testator or written papers. (St. § 1102 ; 2 Sp. 441-455.) **703.**

I. Where a portion or provision is secured to a child by a marriage settlement or otherwise, and the parent or person standing *in loco parentis*—that is, a person meaning to stand in the place of a parent as regards providing for a relation's child—afterwards by will gives the same child a legacy, whether particular or residuary, without expressly declaring it to be in satisfaction of such portion or provision, in such case, if the legacy is substantially the same in its value, in its nature, in time of payment, in certainty, and in benefit, with the portion or provision, and if it is not given for a different purpose, it will, in the absence of evidence to the contrary, be deemed a full satisfaction, as Courts of Equity now incline against double portions. If the legacy is less in amount than the portion or provision, or if it is payable at a different period, then (looking to the weight of authority) it may be deemed a satisfaction *pro tanto*, or in full, according to the circumstances. (St. § 1103, 1104, 1109, 1110 ; 2 Sp. 427-430,

432, 433, 438-440; *Lady E. Thynne v. Earl of Glengall*, 2 H. L. Cas. 153; *Pinchin v. Simms*, 30 Beav. 119; *Charlton v. West*, 30 Beav. 124; *Coventry v. Chichester*, 2 Hem. & M. 149; 2 D. J. & S. 336; S. C. nom. *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; *Campbell v. Campbell*, L. R. 1 Eq. 383; *McCarogher v. Whieldon*, L. R. 3 Eq. 236; *Paget v. Grenfell*, L. R. 6 Eq. 7; *Bennett v. Houldsworth*, L. R. 6 Ch. D. 671.) **704.**

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CAP. X.

In the case of a provision by will, followed by a provision by deed, the first being revocable, there is no difficulty in the way of the second provision taking effect in lieu of the first; and no election, on the part of the person to be benefited, is required. And if the second provision is construed to be substitutional, it is properly termed an ademption. **705.**

On the other hand, in the case of a provision by deed, followed by a provision by will, the first being not revocable, and actual rights being conferred thereby, it is more natural in one respect to regard the second provision as additional, rather than as substitutional, and the application of the presumption against double portions is consequently more difficult; and indeed no substitutional effect can be given to the will,



**TIT. III.** except by the election of the person intended  
**CAP. X.** to be benefited. (*Lord Chichester v. Coventry*,  
 L. R. 2 H. L. 71; *In re Tussaud's Estate*,  
 L. R. 9 Ch. D. (Ap.) 363, 380.) **706.**

Where by a covenant, to take effect on the death of the settlor, a portion is settled on the husband for life, and then on his wife and children, and an absolute gift of other property is afterwards made by the settlor by will in favour of the husband, it may be a satisfaction of the husband's life interest, under the settlement, but not of the interest of the wife and children.

(*McGregor v. Whieldon*, L. R. 3 Eq. 236, 707.)

It is not necessary that the will be made after the settlement.

**II.** Where a parent or other person standing *in loco parentis* bequeaths a legacy, whether particular or residuary, to a child to whom he stands in that relation, and then, by an act *inter vivos*, makes a provision for the same child, of equal or greater amount, of equal certainty, and substantially the same in kind and in degree of benefit, without expressing it to be in lieu of the legacy, or for other objects than those for which the legacy was given, in such case, in the absence of evidence to the contrary, it will be deemed a satisfaction or ademption of the legacy. And if the provision, *inter vivos*, is

less than the legacy, it will be deemed an *ademption pro tanto*. (St. § 1111, and note, and 1103–1105, 1112, 1113, 1115; 2 Sp. 429, 432–5, 438–440; *Hopwood v. Hopwood*, 22 Beav. 488; 7 H. L. Cas. 728; *Schofield v. Heap*, 27 Beav. 93; *Beckton v. Barton*, 27 Beav. 98; *Montefiore v. Guedalla*, 1 D. F. & J. 93; *Watson v. Watson*, 33 Beav. 575; *Phillips v. Phillips*, 34 Beav. 19; *Dawson v. Dawson*, L. R. 4 Eq. 504; *Nevin v. Drysdale*, L. R. 4 Eq. 517; *Cooper v. Macdonald*, L. R. 16 Eq. 258; *Stevenson v. Masson*, L. R. 17 Eq. 78.) **708.**

A legacy may be adeemed by a gift, though not made on marriage or on any other occasion having a special reference to the donee. (*Leighton v. Leighton*, L. R. 18 Eq. 458.) But a bequest to a daughter is not adeemed by a gift to the husband; nor by an advance to her, on her marriage, for her outfit. (*Ravenscroft v. Jones*, 32 Beav. 669.) **709.**

And this doctrine of the constructive No ademption of legacies to strangers. ademption of legacies has never been applied to legacies to wives or to mere strangers, unless under some peculiar circumstances; as where the legacy is bequeathed for a particular purpose, and a portion is afterwards given by the testator, by an act *inter*

**TIT. III.** Equity will treat it as a penalty, and relieve  
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benefit.

testator, is justified in its interference so far only as that purpose requires. (St. § 1083, note.) **687.**

A person may decline one benefit given him by a will, such as a legacy charged with a portion, without being precluded from taking another benefit by the same will; unless it is fairly inferable, from the nature of the different benefits, that he should either take all or reject all. (St. § 1081: see 2 Sp. 591.) **688.**

Election in  
the case of a  
settlement.

Election may also arise where a person attempts to claim both under and in opposition to a settlement. It is a rule that a person will not be allowed to take under and against the same instrument. (*Anderson v. Abbott*, 23 Beav. 457; *Mosley v. Wood*, 29 Beav. 407; *Brown v. Brown*, L. R. 2 Eq. 485; *Codrington v. Lindsay*, L. R. 8 Ch. Ap. 578, 593; 7 H. L. 854. **689.**

Election  
need not be  
made in  
ignorance of  
circum-  
stances.

The party is not bound to make an election till all the circumstances are known. And if he should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him. And he is entitled, in order to make an election, to have a discovery, and all the accounts taken, in order

to ascertain the real state of the fund. TIT. III.  
CAP. IX.  
(St. § 1098; 2 Sp. 598; *Wintour v. Clifton*,  
21 Beav. 447.) **690.**

Election by conduct must be by a person who has positive information as to his rights to the property, and with this knowledge really means to give that property up. (*Wilson v. Thornbury*, L. R. 10 Ch. Ap. 239.) **691.**

An election may be presumed from a long Election  
presumed. acquiescence or from other circumstances. (St. § 1097; 2 Sp. 598-600; *Worthington v. Wiginton*, 20 Beav. 67.) Remaining in possession of two estates held under titles not consistent with each other, affords no conclusive proof of the kind. (*Spread v. Morgan*, 11 H. L. Cas. 588.) **692.**

The doctrine of election is not of the nature of a positive rule of law which a person is bound to know. And therefore in order to infer an election, it is necessary to show that the person who ought to elect was aware of the doctrine. (*Spread v. Morgan*, 11 H. L. Cas. 588.) **693.**

The doctrine of election is not applied in No election  
in the case  
of creditors the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claim against other funds disposed of by the will; for a creditor

DE III  
DE III

claims not as a mere volunteer but for a valuable consideration, and as *bona fide*. (2 Sp. 582.) **694.**

Gift under  
mistake.

Where a testator gives a much larger property to one child under the mistaken impression that such child did not take under the testator's marriage settlement, he is not bound to elect between his interest under the settlement and the gift by will. (*Box v. Barrett*, L. R. 3 Eq. 244.) **695.**

Disability.

Where the person bound to elect labours under any disability, as infancy or coverture, the Court will consider whether it will be most beneficial for such person to take under or against the will or deed, and will decree accordingly. (2 Sp. 587.) **696.**

Persons  
having  
separate  
rights of  
election as  
next of kin  
of a person  
who died  
without  
electing.

Where a person, who had a right of election, dies intestate, without having exercised it, each of his or her next of kin has a separate right of election; so that neither the election of the majority nor of the heir or administrator will bind the others. (*Fytche v. Fytche*, L. R. 7 Eq. 494.) **697.**

## CHAPTER X.

## OF SATISFACTION.

SATISFACTION may be defined to be the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some claim which the donee has upon the donor. (See St. § 1099–1101, 1106 ; *Ex parte Pye*, 2 Lead. Cas. Eq. 2nd ed. 303 *et seq.*; *Samuel v. Ward*, 22 Beav. 347 ; and references *infra*.) **698.**

TIT. III.  
CAP. X.

Definition.

Equitable questions of satisfaction usually arise in three classes of cases. **699.**

Where  
satisfaction  
arises.

I. In cases of portions secured by a marriage settlement. **700.**

II. In cases of portions given by a will, and an advancement of the donee afterwards in the testator's lifetime. **701.**

III. In cases of legacies to creditors. (St. § 1109.) **702.**

In all these classes of cases, where the satisfaction is a matter of presumption, that

Satisfaction  
resting on  
presump-  
tion may be  
rebutted.

**TIT. III.**  
**CAP. X.**

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I. As to  
portions  
secured by  
settlement.

presumption may be rebutted, either by intrinsic evidence derived from the will itself, or by extrinsic evidence, as by declarations of the testator or written papers. (St. § 1102 ; 2 Sp. 441-455.) **703.**

I. Where a portion or provision is secured to a child by a marriage settlement or otherwise, and the parent or person standing *in loco parentis*—that is, a person meaning to stand in the place of a parent as regards providing for a relation's child—afterwards by will gives the same child a legacy, whether particular or residuary, without expressly declaring it to be in satisfaction of such portion or provision, in such case, if the legacy is substantially the same in its value, in its nature, in time of payment, in certainty, and in benefit, with the portion or provision, and if it is not given for a different purpose, it will, in the absence of evidence to the contrary, be deemed a full satisfaction, as Courts of Equity now incline against double portions. If the legacy is less in amount than the portion or provision, or if it is payable at a different period, then (looking to the weight of authority) it may be deemed a satisfaction *pro tanto*, or in full, according to the circumstances. (St. § 1103, 1104, 1109, 1110 ; 2 Sp. 427-430,

432, 433, 438-440; *Lady E. Thynne v. Earl of Glengall*, 2 H. L. Cas. 153; *Pinchin v. Simms*, 30 Beav. 119; *Charlton v. West*, 30 Beav. 124; *Coventry v. Chichester*, 2 Hem. & M. 149; 2 D. J. & S. 336; S. C. nom. *Lord Chichester v. Coventry*, L. R. 2 H. L. 71; *Campbell v. Campbell*, L. R. 1 Eq. 383; *McCarogher v. Whieldon*, L. R. 3 Eq. 236; *Paget v. Grenfell*, L. R. 6 Eq. 7; *Bennett v. Houldsworth*, L. R. 6 Ch. D. 671.) **704.**

TIT. III.  
CAP. X.

In the case of a provision by will, followed by a provision by deed, the first being revocable, there is no difficulty in the way of the second provision taking effect in lieu of the first; and no election, on the part of the person to be benefited, is required. And if the second provision is construed to be substitutional, it is properly termed an ademption. **705.**

On the other hand, in the case of a provision by deed, followed by a provision by will, the first being not revocable, and actual rights being conferred thereby, it is more natural in one respect to regard the second provision as additional, rather than as substitutional, and the application of the presumption against double portions is consequently more difficult; and indeed no substitutional effect can be given to the will,



**TIT. III.** except by the election of the person intended  
**CAP. X.** to be benefited. (*Lord Chichester v. Coventry*,  
 L. R. 2 H. L. 71; *In re Tussaud's Estate*,  
 L. R. 9 Ch. D. (Ap.) 363, 380.) **706.**

Where by a covenant, to take effect on the death of the settlor, a portion is settled on the husband for life, and then on his wife and children, and an absolute gift of other property is afterwards made by the settlor by will in favour of the husband, it may be a satisfaction of the husband's life interest, under the settlement, but not of the interest of the wife and children. (*McCarogher v. Whieldon*, L. R. 3 Eq. 236.) **707.**

II. As to  
 portions left  
 by will to a  
 child.

II. Where a parent or other person standing *in loco parentis* bequeaths a legacy, whether particular or residuary, to a child to whom he stands in that relation, and then, by an act *inter vivos*, makes a provision for the same child, of equal or greater amount, of equal certainty, and substantially the same in kind and in degree of benefit, without expressing it to be in lieu of the legacy, or for other objects than those for which the legacy was given, in such case, in the absence of evidence to the contrary, it will be deemed a satisfaction or ademption of the legacy. And if the provision *inter vivos* is

less than the legacy, it will be deemed an  
 ademption *pro tanto*. (St. § 1111, and note,  
 and 1103–1105, 1112, 1113, 1115; 2 Sp.  
 429, 432–5, 438–440; *Hopwood v. Hopwood*,  
 22 Beav. 488; 7 H. L. Cas. 728; *Schofield*  
*v. Heap*, 27 Beav. 93; *Beckton v. Barton*,  
 27 Beav. 98; *Montefiore v. Guedalla*, 1 D.  
 F. & J. 93; *Watson v. Watson*, 33 Beav.  
 575; *Phillips v. Phillips*, 34 Beav. 19;  
*Dawson v. Dawson*, L. R. 4 Eq. 504; *Nevin*  
*v. Drysdale*, L. R. 4 Eq. 517; *Cooper v.*  
*Macdonald*, L. R. 16 Eq. 258; *Stevenson v.*  
*Masson*, L. R. 17 Eq. 78.) **708.**

A legacy may be adeemed by a gift,  
 though not made on marriage or on any  
 other occasion having a special reference to  
 the donee. (*Leighton v. Leighton*, L. R. 18  
 Eq. 458.) But a bequest to a daughter is  
 not adeemed by a gift to the husband; nor  
 by an advance to her, on her marriage, for  
 her outfit. (*Ravenscroft v. Jones*, 32 Beav.  
 669.) **709.**

And this doctrine of the constructive  
 ademption of legacies has never been applied  
 to legacies to wives or to mere strangers,  
 unless under some peculiar circumstances;  
 as where the legacy is bequeathed for a  
 particular purpose, and a portion is after-  
 wards given by the testator, by an act *inter*

No ademp-  
 tion of  
 legacies to  
 strangers.

TIT. III.  
CAP. X.

*vivos*, exactly for the same purpose, and for none other. (St. § 1100, note, 1117, 1118; 2 Sp. 430; *Pankhurst v. Howell*, L. R. 6 Ch. Ap. 136.) Indeed, in the case of strangers, the *onus probandi* is upon those who contend that the two provisions are to be considered but as one; whereas in the case of children, the *onus probandi* is on those who contend for the double provision. (2 Sp. 430.) The term "strangers" here includes all who are not legitimate children of the donor, or children to whom he has placed himself *in loco parentis*. (St. § 1116; 2 Sp. 429.) **710.**

Ground of  
the distinc-  
tion.

The ground of the distinction would seem to be, that a legacy by a parent, or by a person *in loco parentis*, is presumed to be intended as a portion, and that it may be fairly regarded as the utmost amount that the testator, from a sense of duty or from parental or *quasi* parental affection, considered himself able and called upon to spare for the legatee, consistently with the accomplishment of other necessary purposes; and that if he afterwards advances the same amount to the same child, it is almost certain, or at all events most likely, that he did so in accomplishment of the same intention of providing for such child to the same

extent; especially where the necessity of making a provision has arisen in his lifetime, as where the provision is made on the marriage of the child. But in the case of a legacy to a stranger, the legacy is a mere arbitrary gift, unconnected with considerations of duty or parental or *quasi* parental affection; and there is as much reason, in such cases, why the testator should choose to make an additional gift, as there was for his making the original gift. **711.**

III. A legacy given to a creditor, if it is of an amount equal to or greater than the debt, and in other respects equally beneficial, will, in general, in the absence of all countervailing circumstances, be deemed to be a satisfaction of the debt, on the principle that a testator shall be presumed to be just before he is generous. (St. § 1119, 1120; 2 Sp. 605-7; *Edmunds v. Low*, 3 K. & J. 318; *Shadbolt v. Vanderplank*, 29 Beav. 405.) But this principle has no application to cases where the testator expressly directs his debts to be paid, and his assets are sufficient to pay both debts and legacies. And the Court leans very strongly against holding the legacy to be a satisfaction. Hence the rule is not allowed to prevail where the legacy is of less amount than the debt, even

TIT. III.  
CAP. X.

III. As to  
legacies to  
creditors.

**TIT. III.**  
**CAP. X.**

as a satisfaction *pro tanto*, unless the creditor assented, in the debtor's lifetime, to such an arrangement; nor where there is a difference in the time of payment of the debt and of the legacy; nor where they are of a different nature, as to the subject-matter, or as to the interest therein; nor where a particular motive is assigned for the gift; nor where the debt is contracted subsequently to the will; nor where the legacy is contingent or uncertain; nor where the bequest is of a residue; nor where the debt is a negotiable security; nor where the debt is on an open and running account, so that the testator might not know whether he owed anything. And as to a debt strictly so called, there is no difference whether it is a debt due to a stranger or to a wife or a child. (St. § 1103, 1122; 2 Sp. 605-8; *Jefferies v. Michell*, 20 Beav. 15; *Hassell v. Hawkins*, 4 Drew. 468; *Cole v. Willard*, 25 Beav. 568; *Hammond v. Smith*, 33 Beav. 452; *Fairer v. Park*, L. R. 3 Ch. D. 309.) **712.**

**IV. As to  
legacies to  
debtors.**

IV. On the other hand, where a creditor leaves a legacy to his debtor, and either takes notice of the debt, or leaves his intention doubtful, Courts of Equity will not deem the legacy as either necessarily or *prima facie* manifesting an intention to

release or extinguish the debt ; but they will require some evidence, either on the face of the will, or *aliunde*, to establish such an intention. (St. § 1123.) For, if the legacy is less than the debt, it would clearly be a positive injury to the creditor to construe the legacy a release of the debt ; and even if the legacy is more than the debt, it does not follow that because the testator has manifested his bounty towards the debtor in that respect, he intends the debtor to have another benefit which has no necessary connection with the former. Where the testator does not mention the debt, but gives the debtor a legacy of equal or greater amount, he thereby benefits the debtor to at least the same extent, by giving him the means of paying the debt, as if he had directly forgiven the debt, but had given the debtor nothing, or nothing but the overplus ; and his reason for thus giving the debtor the means of paying the debt, without alluding to the debt, may have been one of kind consideration towards the debtor, namely, in order that none but the executor might be aware of the debt. **713.**

V. Where an annuity to the separate use v. Annuity. of a married woman is charged on an estate, the gift of an annuity to her generally, and

**TIT. III.**  
**CAP. X.**

charged upon property of a different nature, though to the same amount and payable on the same days, is not a satisfaction. (2 Sp. 609.) And where a person executes a deed by which he gives annuities to certain persons, and then executes another deed by which he gives other annuities to those persons, there is no presumption that the latter were intended to be a substitute for the former, especially where the annuities given by the second deed are of less amount, or the first deed contains a power of revocation which is not exercised by the second deed. (*Palmer v. Newell*, 20 Beav. 32; 8 D. M. & G. 74.)

Covenant to settle lands. So where there is a covenant on marriage to settle specific lands, it will not ordinarily be satisfied by suffering other lands of equal value to descend. (2 Sp. 610.)

Covenant to bequeath. And an appointment of a sum by will is not a satisfaction of a covenant to bequeath a like sum. (*Graham v. Wickham* (No. 1), 31 Beav. 447; 1 D. J. & S. 474.) **714.**

## CHAPTER XI.

OF PARTITION ; OF SETTLEMENT OF BOUND-  
ARIES ; AND OF ASSIGNMENT OF DOWER.

## SECTION I.

*Of Partition (a).*

THE mode in which a partition is effected is by first ascertaining the rights of the several parties interested, and then issuing a commission to make the partition ; and on the return of the commission and confirmation of the return by the Court, the partition is finally completed by mutual conveyances of the lots made to the several parties. (St. § 650 ; and on this subject see *Agar v. Fairfax*, 2 Lead. Cas. Eq. 2nd ed. 374 *et seq.*) Formerly, if the conveyances could not be executed on account of infancy, or on account of an executory interest, the decree could only put the parties in possession, and secure

TIT. III.  
CAP. XI.  
SEC. I.

Mode of  
partition.

(a) See stat. 31 & 32 Vict. c. 40, and 39 & 40 Vict. c. 17, at the end of the book.



TIT. III.  
CAP. XI.  
SEC. I.

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them in the enjoyment of the parts allotted to them, until conveyances could be made. (St. § 652.) But by the stat. 13 & 14 Vict. c. 60, s. 30, in a decree for partition of lands, it shall be lawful for the Court to declare that any of the parties to the suit wherein such decree is made are trustees of such lands or any part thereof, or to declare concerning the interests of unborn persons who might claim under any party to the suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons, who, upon coming into existence, would be trustees within the meaning of the Act; and thereupon it shall be lawful for the Lord Chancellor, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the Court or the Lord Chancellor might, under the provisions of the Act, make concerning the estates, rights, and interests of trustees born or unborn. **715.**

Title must  
be shown.

As a partition is completed by mutual conveyances, it is essential to show a title;

and if there is anything suspicious in the plaintiff's title, the Court will leave him to Law, unless it is a case of equitable title. (St. § 653.) **716.**

TIT. III.  
CAP. XI.  
SEC. I.

The Court will decree a partition even in a suit by or against persons who are only tenants for life or years; and the decree will be binding on all whom they virtually represent, but not on other persons. Thus, a decree in a suit by or against a tenant for life will be binding on the remainder-man who is not *in esse* at the time, on the ground of virtual representation, if the Court is of opinion that it will be for the benefit of such remainder-man that the agreement should be carried into effect, either as it stands or with such variations as the Court may think proper. (St. § 656, 656a.) **717.**

Partition by  
or against  
tenants who  
have limited  
interests.

But, on the other hand, a reversioner cannot maintain a suit for a partition. (*Evans v. Bagshaw*, L. R. 5 Ch. Ap. 340.) **718.**

The Court will frequently decree a pecuniary compensation to one, in order to make up his share to its proper value, where the estate cannot conveniently be divided into equal parts. (St. § 654.) And instead of dividing each of several distinct estates, the whole of one estate is frequently allotted to one person, and the whole of another estate

Equitable  
adjust-  
ments

TIT. III.  
CAP. XI.  
SEC. I.

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to another person, and a compensation is directed to be made to the person to whom the less valuable estate is allotted. (St. § 657.) So, to one who has made improvements on the estate, the property on which the improvements have been made will be assigned, or a compensation will be given him. And care will be taken to assign to the parties such portions of the estate as will best accommodate them; and the Court will act according to its own notions of general justice and equity between the parties, and will, if necessary for that purpose, direct a distinct partition of each of several portions of the estate in which derivative alienees have distinct interests, in order to protect those interests; or it will give other special directions to the commissioners, and nominate the commissioners, instead of allowing them to be nominated by the parties. (St. § 655, 656 b, c.) **719.**

## SECTION II.

*Of the Settlement of Boundaries.*

The general rule observed by Courts of Equity is not to exercise jurisdiction in settling boundaries on the mere ground that they are a subject of controversy, but to require that there should be some superadded equity. (St. § 615-623; and on this subject see *Wake v. Conyers*, 2 Lead. Cas. Eq. 2nd ed. 362 *et seq.*) **720.**

TIT. III.  
CAP. XI.  
SEC. II.

General  
rule.

Thus, if the confusion of boundaries has been occasioned by fraud, that will constitute a sufficient ground for the interference of the Court. And if the fraud is established, the Court will by commission ascertain the boundaries, if practicable; and if that is not practicable, it will do justice between the parties by assigning reasonable boundaries or setting out lands of equal value. (St. § 619, 623.) **721.**

Confusion  
through  
fraud.

In the next place, there will be a sufficient ground for the jurisdiction, if the confusion has arisen by the negligence or misconduct of a person standing in such a relation to the opposite party as imposed

Confusion  
through  
fault of a  
party whose  
duty it was  
to preserve  
the bound-  
aries.

**TIT. III.** upon him an obligation to preserve and  
**CAP. XI.** protect the boundaries. Thus, a tenant or  
**SEC. II.** a copyholder is under an implied obligation  
to preserve them; and if through his default there arises a confusion of boundaries, the Court will interfere as against such tenant or copyholder to ascertain and fix them. But even in these cases, it is indispensable to aver and to establish by proofs that the boundaries cannot be found without being ascertained under the order of the Court. (St. § 620.) **722.**

**Multiplicity** Equitable proceedings will also lie when  
**of suits.** they will prevent multiplicity of suits.  
(St. § 621.) **723.**

## SECTION III.

*Of the Assignment of Dower.*

Courts of Equity will now exercise a concurrent jurisdiction with Courts of Law in the assignment of dower in all cases, after the title of the widow, if disputed, has been established. There is no difficulty in maintaining this jurisdiction, as a case can scarcely be supposed in which the widow may not either want a discovery of the title-deeds, or of dowable lands, or some other kind of discovery, or some assistance which it was the peculiar province of the Court of Chancery to afford. (St. § 624-631; 2 Lead. Cas. Eq. 2nd ed. 402, 403; Tudor's Lead. Cas. Real Prop. 2nd ed. 55.) **724.**

TIT. III.  
CAP. XI.  
SEC. III.

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## TITLE IV.

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**Of Protective Equity,  
Irrespective of Disability.**



## CHAPTER I.

OF PROTECTION FROM LITIGATION OR INJURY,  
AFFORDED BY THE CANCELLING, DELIVER-  
ING UP, AND SECURING OF DOCUMENTS.

TIT. IV.  
CAP. I.

Voidable  
and void  
instruments  
and those  
which have  
answered  
their pur-  
pose.

COURTS of Equity frequently cancel, or rescind, or order the delivery up of instruments which have answered the end for which they were created, or instruments which are voidable, or instruments which are in reality void and yet apparently valid. This is done upon the principle, as it is technically called, *quia timet*, that is, for fear that such instruments may be vexatiously or injuriously used, when the evidence to impeach them may be lost or diminished, or for fear that they may throw a cloud or suspicion over the plaintiff's title and interests. (St. § 694, 698, 699, 700, 705; *Cooper v. Joel*, 27 Beav. 313; *W— v. B—*, and *B— v. W—*, 32 Beav. 574; *Onions v. Cohen*, 2 Hem. & M. 354.) **725.**

But where the illegality of the instru-

ment appears on the face of it, so that its nullity can admit of no doubt, Equity will not interfere; because, in that case, the ground for interference does not exist. (St. § 700 a.) **726.**

TIT. IV.  
CAP. I.

Courts of Equity will generally cancel or rescind instruments, or order them to be delivered up, where there is an actual or constructive fraud, and the plaintiff has not participated therein, or is not *in pari delicto*; or where there is an offence against public policy, and the plaintiff has participated therein, and is *in pari delicto*, but yet public policy would be more promoted by assisting the plaintiff, than by refusing to assist him. (St. § 298, 695; *W— v. B—*, and *B— v. W—*, 32 Beav. 574.) **727.**

Where both parties are concerned in an illegal act, it does not always follow that they stand *in pari delicto*; for one party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offence. (St. § 300.) **728.**

In cases of usury (*a*), if the lender comes

(a) See *supra*, par. 40, note.

TIT. IV.  
CAP. I.

into a Court of Equity, seeking to enforce the contract, the Court will refuse to give any assistance, and will repudiate the contract. But, on the other hand, if the borrower comes into a Court of Equity, seeking relief against the contract, the Court will interfere, although only on the terms that the plaintiff will do equity, by paying the defendant what is really due to him, deducting the usurious interest. (St. § 301.) And if the borrower has paid the money, Courts of Equity, and indeed Courts of Law also, will assist him to recover back the excess beyond principal and lawful interest; for the maxim, *volenti non fit injuria*, does not apply to the borrower, since he cannot be said to have voluntarily paid the usurious interest; and as to being a participator in the offence, he was compelled to submit to the terms which oppression and his necessities imposed on him. (St. § 302.)

## 729.

But relief is not granted where both parties are truly *in pari delicto*; for the maxim is, that *in pari delicto, potior est conditio defendentis et possidentis*. (St. § 298, 299.) An exception occurs, however, as already stated, where public policy would thereby be promoted; as in the case of a gaming

security (a), which is void, and money paid on it may be recovered back. (St. § 303, 304.) **730.**

TIT. IV.  
CAP. I.

The Court will not interfere between a voluntary donor and donee, either by causing a voluntary deed or writing to be delivered up to the donor, or by decreeing specific performance of it in favour of the donee, unless the subsequent conduct of the donor has raised an equity for valuable consideration in favour of the donee. And a purchaser for value of an interest in land from a voluntary donor cannot require the voluntary deed or agreement to be delivered up to him to be cancelled. (*De Hoghton v. Money*, L. R. 1 Eq. 154; *Dillwyn v. Llewelyn*, 4 D. F. & J. 517.) **731.**

Voluntary  
deed.

Where, just before going through the marriage ceremony with his deceased wife's sister, a man vests property in trustees for her benefit, neither he nor his representatives after his death can set the gift or settlement aside. (*Ayerst v. Jenkins*, L. R. 16 Eq. 275.) **732.**

A settlement made by an unmarried lady shortly after majority, without contemplating marriage with any particular person, will be

(a) See *Smith's Manual of Common Law*, 8th ed., par. 219—227.

TIT. IV. set aside, as an improvident act of a person  
 CAP. I. who ought to be protected by the Court.  
 (Everitt v. Everitt, L. R. 10 Eq. 405.) **733.**

Forged  
 instru-  
 ments.

Forged instruments may be decreed to be delivered up, without any prior trial, on the point of forgery. (St. § 701.) **734.**

Delivery up  
 of unexcep-  
 tionable  
 instruments  
 to party  
 entitled to  
 them.

Assistance will often be given even in regard to unexceptionable instruments. A Court of Equity will order them to be delivered up to the party entitled to them, if his title to the property to which they relate is not disputed. But where the title to the possession of deeds and other writings depends on the validity of the title of the party to the property to which they relate, and he is not in possession of the property, and the evidence of his title to it is in his own power, or it does not depend on the production of the deeds or writings of which he prays the delivery; in such case, he must first establish his title to the property before he can entitle himself to a delivery of the deeds. (St. § 703.) **735.**

Inspection  
 and copies  
 of deeds.

Again, persons having rights and interests in real estate are entitled to an inspection and copies of the deeds under which they claim title. (St. § 704.) **736.**

Securing of  
 documents.

And remainder-men and reversioners, and other persons having limited or ulterior in-

terests in real estate, have a right, in many cases, to have the title-deeds secured or brought into Court for preservation. But this will not be directed, unless it clearly appears that there is danger of a loss or destruction of the instruments in the hands of the persons possessing them; and also that the interest of the plaintiff is not too contingent or too remote to warrant the proceeding. (St. § 704.) **737.**

Bonds and notes given by a relative have been ordered to be delivered up by executors or administrators, where it has been fairly inferable, from the conduct of the deceased, that he did not intend that any use should be made of the securities. (See St. § 705 a-706 a.) **738.**

TIT. IV.  
CAP. I.

Delivery  
up of securi-  
ties.

## CHAPTER II.

OF PROTECTION FROM LITIGATION RESPECTING  
THE PROPERTY OF ANOTHER, BY MEANS OF  
INTERPLEADER.TIT. IV.  
CAP. II.Common  
Law pro-  
cess.

THERE was a process of interpleader at Common Law, but it had a very narrow range of application (St. § 801); and prior to the statute 1 & 2 Will. IV. c. 58, it fell into entire disuse (St. § 805); and although the application of the legal remedy of interpleader has been greatly extended, yet the jurisdiction in Equity seems to have been left substantially to the old foundation. (St. § 823.) **739.**

Definition  
of an inter-  
pleader.

An interpleader is a proceeding by a person from whom two or more other persons, whose titles are connected (by reason of the one being derived from the other, or of both being derived from a common source), and whose rights he cannot readily determine, have claimed the same thing, wherein he himself claims no interest, and the object of which is to compel them to contest the

matter between themselves, without involving him in any vexatious litigation respecting it. (See St. § 806, and notes, and 807, 810–816, 820, 824; *Jones v. Thomas*, 2 Sm. & Gif. 186.) **740.**

TIT. IV.  
CAP. II.

Thus, where a tenant is liable to pay rent, but there are several persons claiming title to it, in privity of contract or tenure, he is entitled to file an interpleader to compel them to ascertain to whom the rent is payable. (St. § 811.) But if a claim to rent is set up by a mere stranger, under a title paramount, and not in privity of contract or tenure, the tenant cannot compel his landlord to interplead with such a stranger; for the demand made by the latter is not a demand of the same nature or in the same right: the stranger cannot demand the rent, as such, but if he succeeds in an ejectment, he has only a right to damages for use and occupation; whereas the landlord claims the rent, as such, in privity of contract, tenure, and title. (St. § 817 b.) Besides, the tenant is under a contract to pay the rent to his landlord. (St. § 812 b.) (On this subject see *Cook v. Earl of Rosslyn*, 1 Gif. 167.) **741.**

Illustrations in the case of landlord and tenant.

Where the title of the one claimant was not derived from that of the other, nor were they

Connection between the titles of the two claimants.



TIT. IV.  
CAP. II.

both derived from the same common source, but they were independent of and adverse to each other, the party holding the property had to defend himself as well as he could at Law; for if a Court of Equity had exercised jurisdiction in such cases, it would have been asserting the right to try mere legal titles, on a controversy between different parties, where there was no privity of contract between them and the third person who called for an interpleader. (St. § 816, 820.) The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, may, however, enable a Court of Equity to deal with such cases. **742.**

Principal  
and agent.

Property put into the hands of a private agent by his principal, or received by an agent for his principal, is not the subject of an interpleader, on the assertion of a claim to it by a third person under an independent adverse title; but the agent must deliver it to the principal: for the possession of the agent is the possession of the principal. And the like doctrine would prevail in favour of a third person to whom the principal, after the bailment, had transferred the right to the property, where the transfer had been recognised and assented to by the agent. (St. § 817, 817 a, 818.) But if the principal has created an interest in or lien

on the funds in the hands of the agent, in favour of a third person, and the nature and extent of that interest or lien is controverted between the principal and such third person, there an interpleader will lie. (St. § 817 a.)

TIT. IV.  
CAP. II.

### 743.

It seems essential that the person by whom an interpleader is filed should be in such a position as to be able to admit the title of either claimant. Thus, a sheriff, who seizes goods on execution, cannot ordinarily maintain an interpleader, on account of the existence of adverse claims to the property; for, as to one of the defendants, he necessarily, under ordinary circumstances, admits himself to be a wrongdoer. (See St. § 821; and *Child v. Mann*, L. R. 3 Eq. 806, where a bill of interpleader by a sheriff, who sold under the order of the Court of Chancery, was sustained.)

Ability to  
admit title  
of either  
claimant.

### 744.

It is not necessary that proceedings should have been commenced either at Law or in Equity, in order to found a jurisdiction for an interpleader. (St. § 802.)

Actual pro-  
ceedings  
not neces-  
sary.

### 745.

In order to prevent an interpleader being made the instrument of delay or of collusion with one of the parties, the Courts require that the plaintiff should make an affidavit that there is no collusion between him and

Prelimi-  
naries.

TIT. IV.  
CAP. II. any of the other parties ; and also, if it is a case of money due by him, that he should bring the money into Court, or at least should offer to do so. (St. § 809.) **746.**

## CHAPTER III.

OF PROTECTION FROM REPEATED OR RENEWED  
LITIGATION, AFFORDED BY DECREES UPON  
BILLS OF PEACE OR PROCEEDINGS TO  
ESTABLISH WILLS.

## SECTION I.

*Of Bills of Peace.*

THAT which was termed a Bill of Peace is a proceeding filed to establish and perpetuate, in favour of or against a number of persons, some general private right, which from its nature is likely to be sought to be established or overthrown by different persons, at different times, and by different actions; or to confirm and perpetuate a right which has been satisfactorily established by two or more trials at Law, but is in danger of being again controverted. (St. § 853, 854, 859.) **747.**

TIT. IV.  
CAP. III.  
SEC. I.

Definition  
of a bill of  
peace.

In the former of these classes of cases, Equity interferes in order to prevent multi-  
Ground  
of inter-  
ference.

TIT. IV.  
CAP. III.  
SEC. I.

plicity of suits; in the latter, to prevent oppressive litigation. (St. § 853, 854, 859.)  
**748.**

Instance of  
the first  
class of bills  
of peace.

The former occurs in the case of a proceeding to settle the amount of a general fine to be paid by all the copyhold tenants of a manor, or to establish a right of common of the freehold tenants of a manor. (St. § 856; *Phillips v. Hudson*, L. R. 2 Ch. Ap. 243; *Warrick v. Queen's College, Oxford*, L. R. 10 Eq. 105; 6 Ch. Ap. 716; *Jegon v. Vivian*, L. R. 6 Ch. Ap. 742. For other instances, see St. § 855, 856.) **749.**

Pre-requi-  
sites to a  
bill of peace.

In most cases of this class, before the stat. 21 & 22 Vict. c. 27, enabling the Court of Chancery to try questions of fact, with or without a jury, it was held that the plaintiff ought to establish his right by a determination of a Court of Law, before he filed his bill in Equity. And if he did not do so, and the right he claimed had not the sanction of a long possession, and he had any means of trying the matter at Law, a demurrer would hold; for the object of these bills, as their name itself imports, was simply to secure the quiet enjoyment of a right which, *primâ facie* at least, clearly exists, and not to decide the question of a doubtful right. If he had not been actually inter-

rupted or dispossessed, so that he had had no opportunity of trying his right, he might file a bill to establish it, and the Court would, if it was necessary, ascertain it by an action or issue at Law, and then make a decree finally binding on all parties. (See St. § 854, and note.) **750.**

It seems that Courts of Equity, on principles of public policy, will not, on such a proceeding, decree a perpetual injunction for the establishment or the enjoyment of the right of a party who claims in contravention of a public right. (St. § 858.) **751.**

TIT. IV.  
CAP. III.  
SEC. I.

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Rights in  
contraven-  
tion of  
public  
rights not  
protected in  
this way.

## SECTION II.

*Of Proceedings to establish Wills.*

TIT. IV.  
CAP. III.  
SEC. II.

Jurisdiction  
in general  
belongs to  
the Court of  
Probate.  
Exceptions.

The proper jurisdiction for deciding as to the validity of wills, where they are actually contested, belongs to the Court of Probate, subject to these exceptions: **752.**

1. The heir-at-law may, by consent, come into a Court of Equity to have the validity of the will tried. He cannot come into Equity unless by consent; because he has a legal remedy by ejectment, and if there are any impediments to the proper trial of the merits of such an ejectment, he may come into Equity to have them removed. (St. § 1447, note; see stat. 21 & 22 Vict. c. 27; 25 & 26 Vict. c. 42; *Egmont v. Darell*, 1 Hem. & M. 563; *Cowgill v. Rhodes*, 33 Beav. 310.) **753.**

2. A devisee in possession, whether legal or equitable, has an equity to have the will established against the heir, although the heir has brought no action of ejectment against the devisee, and although no trusts are declared by the will, and although it is

not necessary to administer the estate under the direction of a Court of Equity. (*Boyse v. Rossborough*, Kay, 71, 102, 111; 1 K. & J. 124, 139; 3 D. M. & G. 817; 6 H. L. Cas. 1; *Williams v. Williams*, 33 Beav. 306.) And the Court has jurisdiction to entertain a suit to establish a will against the parties claiming under a prior will. (*Lovett v. Lovett*, 3 K. & J. 1.) **754.**

3. And where a will is contested, and it is necessary to establish its validity, in order to accomplish purposes which it is the province of Courts of Equity to effect (such as the execution of trusts, the marshalling of assets, &c.), and the parties are dissatisfied with the probate, the Court of Equity in which the controversy is depending will cause the validity of the will to be tried; and if the will is established, a perpetual injunction may be decreed. (St. § 1445-7; see Sir Hugh Cairns' Act, stat. 21 & 22 Vict. c. 27; and Sir John Rolt's Act, 25 & 26 Vict. c. 42.) **755.**

TIT. IV.  
CAP. III.  
SEC. II.

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## CHAPTER IV.

### OF PROTECTION FROM LOSS OR INJURY BY INJUNCTION.

**TIT. IV.**  
**CAP. IV.**

**Jurisdic-  
tion.**

**THE** jurisdiction in granting injunctions has arisen either from the want of any legal remedy, or from the imperfection and inadequacy of the legal remedy in cases where any such remedy exists. (St. § 864.)  
**756.**

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 79-82), the power of granting injunctions in certain cases was given to the Superior Courts of Common Law. This, however, did not oust the jurisdiction of the Court of Chancery, but only gave concurrent jurisdiction to the Courts of Common Law. **757.**

By the stat. 28 & 29 Vict. c. 99, s. 1, par. 8, the power of granting an injunction in certain cases is given to the County Courts. **758.**

Injunctions, when granted on bills, are either temporary, as until the coming in of matter of defence, or until the further order of the Court, or until the hearing of the cause; or they are perpetual, as when they form a part of the decree after the hearing, and amount to a perpetual prohibition. (St. § 873.) **759.**

TIT. IV.  
CAP. IV.

Injunctions  
are either  
temporary  
or per-  
petual,

Injunctions may be also either total or partial, qualified or unconditional. (St. § 886.) And some are of a preventive, others of a restorative character. The former are the most common. (St. § 862.) **760.**

total or par-  
tial, quali-  
fied or un-  
conditional,  
preventive  
or restora-  
tive.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8), "a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is

Injunctions  
and re-  
ceivers.

**TIT. IV.** or is not in possession under any claim of  
**CAP. IV.** title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable." **761.**

Equity will not limit its power of granting injunctions.

General rule as to cases where they will be granted.

Some specific cases pointed out.

Courts of Equity constantly decline laying down any rule which shall limit their power and discretion as to the particular cases in which injunctions shall be granted or withheld. (St. § 959 b.) And it would seem that unless some special reason intervenes, they will in all cases grant an injunction to protect their own officers, who execute their process, against any suit brought against them for acts done under or by virtue of such process (St. § 891); and to prevent any one from prejudicing another, contrary to equity and good conscience (see St. § 903-908, 927-9, 951-9): so that it would appear to be only needful to advert to a few specific cases presenting points which are not of a sufficiently obvious character to be omitted. **762.**

I. Waste.

I. An injunction will be granted to restrain voluntary waste. (St. § 912-919.) But Courts of Equity have no means of interfering in cases of permissive waste by a

tenant for life. (*Powys v. Blagrave*, Kay, TIT. IV.  
CAP. IV. 425; 4 D. M. & G. 448.) **763.**

A tenant for life impeachable of waste is only allowed to fell timber, when, where, and in such a manner as that it will be for the benefit of the succession: and he is not entitled to the timber when cut. (2 Sp. 570; *Bagot v. Bagot*, 32 Beav. 509.) **764.**

A tenant for life, unless unimpeachable for waste, is not entitled to open any mines of coal or minerals or quarries which had not been previously opened, but may work open mines. (2 Sp. 573; *Bagot v. Bagot*, 32 Beav. 509.) **765.**

By the Judicature Act, 1873 (36 & 37 Equitable  
waste. Vict. c. 66), s. 25 (3), "An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." **766.**

Prior to this Act the Court of Chancery would sometimes interfere with respect to what is commonly, although with no great propriety, called equitable waste (St. § 912); that is, such destructive or injurious acts as would not be punishable as waste at Law,

TIT. IV.  
CAP. IV.

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because consistent with the legal rights of the party committing them, but which are considered as waste, and as unjustifiable, in the view of a Court of Equity, as occasioning an unconscientious and irreparable injury to the interests of the other parties; as where a tenant for life without impeachment of waste, or a tenant in tail after possibility of issue extinct, or a tenant in fee with an executory devise over, attempts or intends to pull down houses, or totally to destroy a wood, or to cut down trees which were planted, even though by himself, or were left standing for the shelter or ornament of the house or its grounds. (St. § 915; 2 Sp. 570, 571; *Micklethwait v. Micklethwait*, 1 D. & J. 504; *Turner v. Wright*, Johns. 740; 2 D. F. & J. 234; *Baker v. Sebright*, L. R. 13 Ch. D. 179.) **767.**

Where such trees have been cut down, the Court will give damages proportionate to the injury (if any) done to the inheritance. (*Bubb v. Yelverton*, *Ex parte Hastings*, L. R. 10 Eq. 465.) **768.**

An equitable tenant for life unimpeachable for waste, is entitled to have ornamental timber cut down which is necessary to be cut for the preservation and improvement of the remaining ornamental timber, and to

have the proceeds thereof. But the remainderman has a right to require that the cutting be done under the direction of the Court, lest even without intending it, irreparable mischief be done by an improper mode of cutting down the timber. (*Baker v. Sebright*, L. R. 13 Ch. D. 179.) **768 a.**

TIT. IV.  
CAP. IV.

On similar grounds, although in general the Court will not interfere by injunction to prevent waste as between tenants in common, or co-parceners, or joint tenants, because they have a right to enjoy the estate as they please, and because they can make partition when they choose, so as to prevent future waste; yet the Court will interfere in special cases, as where the waste is destructive of the estate, and not within the usual legitimate exercise of the right of enjoying the estate. (St. § 916; and see *note.*) **769.**

Waste in the case of tenants in common, co-parceners, and joint tenants.

I. In the case of public nuisances, an action lies in Equity to redress the nuisance by way of injunction. (St. § 923, *a.*) In regard to private nuisances, in order to justify the interposition of a Court of equity, there must be such an injury as of its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance must

II. Public nuisances.

Private nuisances.

**TIT. IV.** occasion a constantly recurring grievance,  
**CAP. IV.** which cannot be prevented otherwise than  
 by an injunction. (St. § 925, 926; see *Eaden v. Firth*, 1 Hem. & M. 573; *Tipping v. St. Helen's Smelting Company*, L. R. 1 Ch. Ap. 68.) **770.**

**III. Patents.** **III.** The Court frequently interferes in cases of patents for inventions. (St. § 930-3; *Clark v. Fergusson*, 1 Gif. 184.) If the patent has been recently granted, and its validity has not been already ascertained by a trial, and the defendant denies it, or puts the matter in doubt, there, in general, the Court will not grant an immediate injunction, but will require the validity of the patent to be ascertained in the first instance. But if the patent has been granted some length of time, and the patentee has put the invention into public use, and has had an exclusive possession of it under his patent for such a period of time that there is a fair ground for presuming that he has an exclusive right, the Court will ordinarily interfere by way of preliminary injunction, pending the proceedings; reserving, of course, until the ultimate decision of the cause, its own final judgment on the merits. And an injunction will be granted after the time

limited for the expiration of a patent, to restrain the sale of articles manufactured in violation of the patent, while it was in force. (St. § 934.) **771.**

TIT. IV.  
CAP. IV.

IV. Courts of Equity often afford protection to copyrights, and act upon similar principles with respect to the title. (St. § 935, 949, 950; see Phillips on Copyr. 146-166.) **772.**

IV. Copy-  
rights.

If a work is of a clearly irreligious, immoral, libellous, or obscene character, they will not protect it. (St. § 936-8.) **773.**

It is not an infringement of the copyright of a book to make *bond fide* quotations or extracts from it, or a *bond fide* abridgment of it, or to make a *bond fide* use of the same common matter in the compilation of another work. But what constitutes a *bond fide* case of extracts, or a *bond fide* abridgment, or a *bond fide* use of the same common materials, is often a matter of most embarrassing inquiry. (Upon this subject, see St. § 939-942, and notes; and *Jarrold v. Houlston*, 3 K. & J. 708; *Hotten v. Arthur*, 1 Hem. & M. 603.) **774.**

It is not an infringement of copyright for a person to represent a play dramatised from a novel written by another. But it is an infringement to print and publish a play so



**TIT. IV.** constructed, at least if it embodies verbatim  
**CAP. IV.** the most stirring passages from the novel  
 (Tinsley v. Lacy, 1 Hem. & M. 747.) **775.**

**V. Letters.** V. Courts of Equity will also restrain the publication of private letters, whether of a literary character or otherwise, where the publication is attempted without the consent of the author. The property which the receiver has in letters is of a qualified kind. To permit the receiver to publish letters of a literary character would be allowing him to sell or give away that which belongs and may be of value to another; and to permit the receiver to publish letters of other kinds would be allowing a practice which must prove most prejudicial to the interests of society. (St. § 944-8; see Phillips on Copyr. 27-34.) **776.**

**VI. Applications to Parliament.** VI. Applications to Parliament on private grounds may be restrained by injunction; but applications on public grounds cannot be restrained. (*Lancaster and Carlisle Railway Company v. North Western Railway Company*, 2 K. & J. 293; see *Steele v. North Metropolitan Railway Company*, L. R. 2 Ch. Ap. 237.) **777.**

**VII. Injunction against a suit in a foreign country.** VII. Where both the parties to a suit in a foreign country are residing within this

country, the Courts of Equity have full authority to act on them, whether by injunction or otherwise, with regard to such suits; because they can act on the parties *in personam*, without presuming to direct or control the foreign Court. (St. § 899, 900.) **778.**

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Courts of Equity effectuate their own decrees in many cases, by enjoining parties to yield up, deliver, quit, or continue the possession. (St. § 959.) **779.**

## CHAPTER V.

OF PROTECTION FROM ANOTHER'S ABSCOND-  
MENT BY THE WRIT OF NE EXEAT  
REGNO (*a*).

TIT. IV. THE writ of *ne exeat regno* is a prerogative  
CAP. V. writ which is issued to prevent a person  
from leaving the realm (St. § 1465), even  
though his usual residence is in foreign  
parts. (2 Sp. 15.) **780.**

It was originally applied only to great  
political purposes. (St. § 1467.) And al-  
though it is now applied in certain cases by  
custom to private civil matters only, yet it  
is employed with great caution and jealousy.  
(St. § 1467, note, § 1468.) **781.**

This writ will not be granted, except in  
cases of equitable debts and claims; for, in  
regard to civil rights, it is treated in the  
nature of an equitable bail. (St. § 1470.)  
**782.**

(*a*) See the Absconding Debtors Act, 1870, stat.  
33 & 34 Vict. c. 76.

To this, however, there are two exceptions: TIT. IV.  
CAP. V.

1. Where alimony was actually decreed by the Ecclesiastical Court, and no appeal was made against the decree, the writ was granted, unless the husband made it appear that he did not intend to leave the kingdom. And it is presumed the writ would now be granted under similar circumstances in the case of alimony decreed by the Divorce Court. (St. § 1471 and note, and § 1472.) 2. Where there is an admitted balance due from the defendant to the plaintiff, but a larger sum is claimed by the latter, the writ will be issued. (St. § 1471, 1473.) **783.**

The equitable demand for which the writ will be issued must be certain in its nature, a pecuniary character, and actually payable, and not contingent. (St. § 1474.) **784.**

## CHAPTER VI.

OF THE PROTECTION OF PROPERTY, BY TAKING  
AWAY THE POSSESSION OR RECEIPT THERE-  
OF, OR BY REQUIRING SECURITY.

TIT. IV.  
CAP. VI.

I. Appoint-  
ment of a  
receiver (a).

I. COURTS of Equity very frequently prevent anticipated wrong or loss, by the appointment of a receiver to receive rents and other income or profits. (St. § 826.) And such an appointment may be made even where the property is legal, and judgment creditors have taken possession of it under writs of *elegit*; for it is competent for the Court to appoint a receiver in favour of annuitants and equitable creditors, not disturbing the just prior rights, if any, of judgment creditors. (St. § 829.) **785.**

By the Judicature Act (36 & 37 Vict. c. 66), s. 25 (8), "a mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the

(a) See stat. 23 & 24 Vict. c. 145, s. 17-24.

Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just." **786.** TIT. IV.  
CAP. VI.

A receiver so appointed is treated as virtually an officer and representative of the Court, for the more speedy getting in of such rents, income, or profits, and the securing the same for the benefit of the person entitled to it. In the case of adverse claims the appointment of a receiver does not at all affect the right. The Court virtually becomes the landlord *pro hac vice*, and the receiver, as an officer of the Court, is generally entitled to the possession; and his possession is treated as the possession of the Court, in the first instance, and then of the party who ultimately establishes his right to it; and, therefore, is not to be disturbed, even by an ejectment under an adverse title, without the leave of the Court. (St. § 831, 833, 833 a.) **787.** Nature of  
his office  
and possession.

The receiver cannot proceed in any ejectment against the tenant, except by the authority of the Court. (St. § 833.) And when in possession, he has very little discretion allowed him, but must apply from time to time to the Court for authority to His power.

**TIT. IV.** do such acts as may be beneficial to the  
**CAP. VI.** estate. (St. § 833 a.) **788.**

**II. Payment**  
**into Court,**  
**or to the**  
**party**  
**entitled, or**  
**security.**

**II.** In other cases, the Court affords protection by an order to pay a fund into Court ; in others, by directing security to be given, or money to be paid over. (St. § 826, 839-848.) **789.**

**III. Deposit**  
**of docu-**  
**ments.**

**III.** The Court will also direct that papers and writings in the hands of executors and administrators shall be deposited with the Court for the benefit of those interested, unless there are other purposes which require that they should be retained in the hands of the executors or administrators. (St. § 842.) **790.**

**IV. Delivery**  
**of chattels.**

**IV.** The Court will not ordinarily entertain suits for the specific delivery of chattels. But where the chattel is of such a nature that the loss of it could not be fully compensated by damages, the Court will decree a specific delivery thereof. (St. § 708-710 ; *Pusey v. Pusey*, *Duke of Somerset v. Cookson*, 1 Lead. Cas. Eq. 2nd ed. 654, 655 *et seq.*) **791.**

## TITLE V.

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**Of Protective Equity,  
In Favour of Persons under Disability.**



## CHAPTER I.

## OF INFANTS.

**TIT. V.** THE care of infants, as persons who are not  
**CAP. I.** able to protect themselves, belonged to the  
 Jurisdiction. Sovereign, as *parens patriæ* ; and the correct  
 opinion seems to be that this prerogative was  
 delegated to the Court of Chancery from its  
 first establishment ; and that the jurisdiction  
 did not belong to the Lord Chancellor only,  
 in virtue of his general power as holder of  
 the great seal and as keeper of the Royal  
 conscience ; since the jurisdiction might be  
 exercised as well by the Master of the Rolls  
 as by the Chancellor, and since an appeal  
 lay, as in other cases in which the Court of  
 Chancery had a general jurisdiction, from  
 the decision of the Court of Chancery to  
 the House of Lords. (St. § 1333-7.) And  
 on this subject see *Eyre v. Countess of*  
*Shaftesbury*, 2 Lead. Cas. Eq. 2nd ed. 538  
*et seq.* **792.**

By the Judicature Act, 1873 (36 & 37 TIT. V.  
CAP. I. Vict. c. 66), s. 34, there shall be assigned, subject as thereinbefore mentioned, to the Chancery Division of the High Court of Justice, the wardship of infants and the care of infants' estates. By the same Act, s. 25 (10), "in questions relating to the custody and education of infants, the Rules of Equity shall prevail." **793.**

The Supreme Court will appoint a suitable guardian to an infant, where there is Appointment of guardians. no other, or no other who will or can act, at least where the infant has property. If the infant has no property, the Court, perhaps, will not interfere; not from want of jurisdiction, but because it cannot exercise its jurisdiction usefully, without having the means of applying property for the benefit of the infant. Guardians appointed by the Court are considered as officers of the Court, and are held responsible to it accordingly. (St. § 1338.) **794.**

The Court will remove a guardian of any Removal of guardians. kind, whenever sufficient cause can be shown for such a purpose, or will regulate and direct Control over them. the conduct of the guardian in regard to the custody and education and maintenance of the infant, and, if necessary, will even appoint the school where he shall be

TIT. V.  
CAP. I.

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educated, and will require security to be given, if there is any danger of injury to his person or property. (St. § 1339.) **795.**

Religion.

The doctrine of the Court is that children should be brought up in the religion of their father. So that when a deceased father was a member of the Church of England, and the mother, who was their guardian, had become one of the Plymouth Brethren, she was restrained from taking them to a meeting-house of that sect. (*In re Newbery*, L. R. 1 Eq. 431; 1 Ch. Ap. 263; *In re Besant*, L. R. 11 Ch. D. (Ap.) 508.) **796.**

Of course the father may waive this right. But he does not waive or forfeit it, if a Protestant, even by a pre-nuptial engagement that the children shall be brought up in the religion of the mother, a Roman Catholic; for such an engagement is absolutely void, and he has the legal right to the custody and control of his children, as against the mother, and as against the children while under age, and as against any other guardian, and even as against the Court itself, unless by moral misconduct or physical inability, or by the profession of immoral or irreligious opinions, deemed to unfit him to have the charge of his children, it would be highly inexpedient for the interests of the children to allow

him to exercise his parental authority over them. And the Court will by injunction enforce his authority as against the mother or children or guardian. In some cases the Court will examine the children to ascertain what course it would be expedient to adopt; in other cases, the Court will leave it entirely to the father. (*Stourton v. Stourton*, 8 D.M. & G. 760; *D'Alton v. D'Alton*, L. R. 4 Prob. D. 87; *In re Agar-Ellis*, *Agar-Ellis v. Lascelles*, L. R. 10 Ch. D. (Ap.) 49, 69-76.) **796 a.**

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CAP. I.

By the stat. 36 Vict. c. 12 (24th April, 1873), it is enacted that "from and after the passing of this Act it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court shall direct; and further, to order that such

Court of Chancery may order that mother may have access to and custody of infant under sixteen years.

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custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said Court shall deem proper" (s. 1). **797.**

Assistance  
of guar-  
dians.

The Court will also assist guardians in compelling their wards to go to the school selected by the guardian, as well as in obtaining the custody of the persons of their wards, when they are detained from them. (St. § 1340.) **798.**

Removal of  
children  
from their  
parents.

In general, parents are entrusted with the custody and education of their children, on the natural presumption that the children will be properly treated, and that due care will be taken of them, in regard to learning, morals, and religion. But whenever this presumption is negatived by the actual state of the case, and a father or a mother is guilty of gross ill-treatment of his infant child, or is living in habits of gross immorality; or otherwise 'acts in a manner injurious to the morals or interests of his or her children, the Supreme Court will deprive him or her of the custody of his or her children, and appoint a suitable person to act as guardian. (St. § 1341-9; *Swift v. Swift*, 34 Beav. 266; *In re Besant*, L. R. 11 Ch. D. (Ap.) 508.) **799.**

Guardians may change the nature of the property, when it is manifestly for the benefit of the infant, but not otherwise. But although it has been said that there is no equity in such a case between the representatives of the infant, nevertheless, for the purpose of preventing any such acts of the guardian, in case of the death of the infant before he comes of age, from changing improperly, through partiality or otherwise, the rights of the parties, who, as heirs or distributees, would otherwise be entitled to the property, Courts of Equity hold lands purchased by the guardian with the infant's personal estate, or with the rents and profits of his real estate, to be personalty, and distributable as such; and on the other hand, they treat the proceeds arising from the sale of real property (as, for example, of timber cut down on a fee-simple estate of the infant) as real estate. It is common for guardians to ask the sanction of the Court to any acts of this sort; and, when the Court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original state. (St. § 1357.) **800.**

TIT. V.  
CAP. I.

Conversion  
of the  
infant's  
property.

Sometimes infants become wards of Court. Who are wards of Court.

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CAP. I.

Properly speaking, a ward of Court is a person who is under a guardian appointed by the Court. But whenever a suit is instituted in the Court relating to the person or property of an infant, although he is not under any general guardian appointed by the Court, he is treated as a ward of the Court. (St. § 1352; *Gynn v. Gilbard*, 1 Dr. & Sm. 356.) And even a mere order for maintenance made without suit constitutes an infant a ward of Court. (*In re Graham*, L. R. 10 Eq. 530.)

**801.**

All acts affecting them must be done under the direction of the Court.

Any act affecting the person or state or property of a ward of Court, unless done under the express or implied direction of the Court, is treated as a violation of the authority of the Court, and the offending party will be arrested for that contempt, and compelled to submit to such order, and to such punishment by imprisonment, as are applied to other cases of contempt. (St. § 1353.)

**802.**

Maintenance (a).

Whenever an infant is a ward of Court, and a suit is depending in the Court as to his property, the Court will direct a suitable maintenance for the infant, having a due regard to his rank, intended

(a) See stat. 23 & 24 Vict. c. 145, s. 26.

profession or employment, property, and expectations. (St. § 1354.) And independently of the stat. 23 & 24 Vict. c. 145, s. 26, maintenance will now be ordered even where the infant is not a ward of the Court, and not resident within the jurisdiction, if he has no father, or his father is unable to maintain him. (See St. § 1354, 1354 a, 1354 b.) **803.**

Where a legacy is vested, it seems that maintenance will be ordered, though none is directed by the will, and though the interest is directed to be accumulated. (2 Sp. 462.) And though a sum be directed to be paid periodically for maintenance, until the time for the payment of the portion, the child will be entitled to a proportionate part during the interval between the last periodical payment and that time. (2 Sp. 462.) And when no maintenance is given, an infant child of the testator is entitled to the interest even of a legacy contingent on his attaining twenty-one. (*Chambers v. Goldwin*, 11 Ves. 1; *Martin v. Martin*, L. R. 1 Eq. 369.) **804.**

The Court has power to charge reversionary property of infants with money required for their maintenance, even where some of them may never become entitled to posses-

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CAP. I.



TIT. V.  
CAP. I.

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sion. (*De Witte v. Palin*, L. R. 14 Eq. 251.)  
**805.**

The Court is governed by a regard to the circumstances and state of the family to which the infant belongs, in respect to the allowance of any maintenance at all, and to the amount of such allowance. So that, although there may be a trust for maintenance under which the whole income may be applied, yet the Court will not apply more of it than necessary, where the infants have other sources of income. (*White v. Grane*, 18 Beav. 571.) And if the father is able to maintain the infant out of his own property, the Court will ordinarily withhold all allowance from the property or income of the infant for the maintenance of the latter, even though there may be a power (as distinguished from a trust), in the settlement or will, at the discretion of the trustees, to appoint part of the income for the purpose of his maintenance and education. (St. § 1354 a, and note; 2 Sp. 462, 466.) But if there is a contract on marriage amounting to a trust that property shall be applied for the maintenance and education of the children, the property must be applied, without reference to the ability of the father to maintain and educate them.

And in the case of a legacy given by a stranger, the interest of it may be so given or directed to be applied as to be in substance a gift to the father, or rather for his benefit. (2 Sp. 466-8.) And if the infant is an eldest son, and the younger children have no provision made for them, an ample allowance will be decreed to him, in order that the younger children may be maintained. And the Court will act in a similar way where the father or mother of the infant is in distress or narrow circumstances. (St. § 1355; 2 Sp. 461, 462.)

**806.**

The Court, however, in allowing maintenance, almost always confines it within the income of the property. But where the property is small, and more means are necessary for the due maintenance of the infant, part of the capital will sometimes be directed to be applied for the purpose. But without the express sanction of the Court, a trustee or guardian should not so apply any part of the capital. (St. § 1355; 2 Sp. 461.)

**807.**

The words "maintenance, education, and bringing up," standing together, have reference to minority only. But where the interest of a fund is directed to be applied for the

Y

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CAP. I.

“maintenance and education” of a person, though at the time an infant, he is, generally speaking, entitled to the interest during his life. “Education” includes maintenance. Where maintenance is given during minority, as a general rule it does not cease on the marriage of the child. (2 Sp. 460 ; *Carr v. Living* (No. 2), 33 Beav. 474.) A direction that the testator’s daughter shall reside with and be maintained by his son, so long as she shall remain single, only entitles her to maintenance so long as he lives, and so long as she chooses to reside with him. (*Wilson v. Bell*, L. R. 4 Ch. Ap. 581.) **808.**

Where the income of property is given to the mother for the maintenance of herself and her children, she is to receive the whole income, and maintain the children out of it, so long as they form part of her family; but when they are forisfamiliarated, as by marriage, they lose the right to maintenance. (2 Sp. 461.) **809.**

Property  
decreed to  
infants by  
foreign  
Court.

Where infants resident here become entitled to personal property, under the decree of a foreign tribunal, it will be administered for their benefit here, just as any other property. (2 Sp. 13, 14.) **810.**

Marriage of  
a ward of  
the Court  
without its  
consent.

If a man marries a ward of Court, without the consent of the Court, even though with

the consent of the guardian, he, and all others concerned in aiding and abetting the act, are treated as guilty of a contempt of Court; and even though he was ignorant that she was a ward of the Court, he is deemed guilty of a contempt. (St. § 1358.) **811.**

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Where the Court appoints a guardian or committee in the nature of a guardian, to have the care of an infant, it is accustomed to require the guardian or committee to give a recognizance that the infant shall not marry without the leave of the Court; so that if the infant should marry even without the knowledge or neglect of the guardian or committee, yet the recognizance would in strictness be forfeited, whatever favour the Court might think fit to show to the party, when he should appear to have been in no fault. (St. § 1359.) **812.**

Recognizance that a ward of Court shall not marry.

Where there is reason to suspect an improvident marriage without its sanction, the Court will, by an injunction, not only interdict the marriage, but also all communications between the ward and the admirer; and if the guardian is suspected of any connivance, the Court will substitute a committee in his stead. (St. § 1360.) **813.**

Interdiction of intended marriage of a ward of Court, and of addresses.

In case of an offer to marry a ward of Court,

Settlement on a ward of Court.

TIT. V. the Court will inquire and ascertain whether  
CAP. I. ——— the match is a suitable one, and what settlement ought to be made on the marriage ; and it is not competent to the parties, by delaying the marriage until the wife has come of age, to defeat the settlement approved by the Court. (2 Sp. 499.) And when a man has been committed for a contempt in marrying a ward of Court without its sanction, he will not be discharged until he has actually made such a settlement as shall have been deemed proper by the Court. And this will be the case even where the ward has subsequently come of age, and is ready to waive her right to a settlement ; for the Court will protect her against her own indiscretion and the undue influence of her husband. (St. § 1361.) **814.**

Where a settlement is executed a few days after the lady, who has been a ward of Court, has attained her majority, and is pursuant to proposals made a very short time before she attained her majority, and is such that the Court would not approve thereof, it will be rectified, if at least it was the work of her friends, and she was not made to understand its effect, and not called upon to exercise her judgment upon it. (*Money v. Money*, 3 Drew. 256.) **815.**

If a ward of Court marries a few days after majority, the Court will decline to order her fortune to be paid out of Court, on her consent, and will refuse to do more than order payment of the income to the husband during their joint lives, or until further order, without prejudice to any question, and with liberty to apply. (*Biddle v. Jackson*, 26 Beav. 282.) **816.**

TIT. V.  
CAP. I.

The Court has no power to order a settlement of the property of an infant, not being a ward of Court, who has married after attaining the age at which she is capable of contracting a marriage. (*In re Potter*, L. R. 7 Eq. 484.) **817.**

Settlement on an infant who is not a ward of Court.

The Court will exercise a vigilant care over infants in the management of their property; and will also aid and protect infants against other persons than those who are guardians; such, for instance, as intruders upon the estate. (St. § 1356.) (a). **818.**

Control over guardians and others for the benefit of infants.

The Court has no jurisdiction to order the cancellation of articles of apprenticeship and the return of a portion of the premium, on the ground of the wrongful refusal

Cancellation of apprenticeship.

(a) On the subject of infants, see 1 Will. IV. cc. 60, 65; 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55; 19 & 20 Vict. c. 120; 37 & 38 Vict. c. 62.

TIT. V.  
CAP. I. of the master to continue to instruct his  
—— apprentice in his trade, according to his  
agreement. (*Webb v. England*, 29 Beav.  
44.) **819.**

## CHAPTER II.

## OF MARRIED WOMEN.

AT the Common Law, the being or legal existence of the wife, for almost all purposes, is considered as merged in that of the husband. (See St. § 1367.) But Courts of Equity, in many respects, treat husband and wife as distinct persons. (St. § 1368.) And this distinctness of interest has been greatly extended by the stat. 33 & 34 Vict. c. 93.

TIT. V.  
CAP. II.

Common  
Law doc-  
trine.  
Division of  
the subject  
of the doc-  
trines of  
Equity as to  
married  
women.

**820.**

In illustration of this, let us consider,

I. The powers which they have, in Equity, of contracting with, and giving and granting to, each other.

II. The wife's pin-money and paraphernalia.

III. The wife's separate estate.

IV. The equity of the wife to a settlement or maintenance out of her own property.

V. Some points respecting deeds of separation. **821.**



## SECTION I.

*The Powers which Husband and Wife have, in Equity, of contracting with, and giving and granting to, each other.*

TIT. V.  
CAP. II.  
SEC. I.

I. Contracts  
before  
marriage.

I. At Law, contracts made between husband and wife before marriage are extinguished by the marriage if they are for debts or things due *in præsentia*, or at or on a future time or event which may occur during, and not after the determination of, the coverture. But Courts of Equity, although they generally follow the same doctrine, will enforce such contracts, where it would be in furtherance of the manifest intention and object of the parties to do so; as in the case of an agreement by husband and wife for the mutual settlement of their estate, or of the estate of either of them on the other, on the marriage, even without the intervention of trustees. (St. § 1370, 1371.) **822.**

II. Contracts  
after mar-  
riage.

II. Contracts made between husband and wife, after marriage, are a mere nullity at Common Law; but under peculiar circumstances, they will be enforced in Equity where they are of a reasonable nature. Thus, if the husband should contract with

his wife, for good reasons, that she should separately possess and enjoy property bequeathed to her, the contract would be upheld in Equity. (See St. § 1372; *Hewison v. Negus*, 16 Beav. 594; *Anderson v. Abbott*, 23 Beav. 457.) And by the stat. 33 & 34 Vict. c. 93, s. 11, it is enacted that "a married woman may maintain an action, in her own name, for the recovery of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property." So the wife may even become a creditor of her husband: and her rights, as such, will be enforced against him and his representatives. Thus, if a wife should raise money out of her estate, to answer his necessities, whatever be the mode adopted to carry that purpose into effect, she would in Equity be entitled to reimbursement out of his estate. (St. § 1373.) But a contract by the husband to transfer his rights and duties in reference to his children to his wife is contrary to public policy, and will not be enforced (*Vansittart v. Vansittart*, 4 K. & J. 62; *Walrond v. Walrond*, Johns. 18); unless his conduct has been such, that the Court of Chancery would remove the children

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CAP. II.  
SEC. I.

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TIT. V. from his custody. (*Swift v. Swift*, 34 Beav.  
CAP. II. 266.) **823.**  
SEC. I.

III. Gifts  
and grants  
after mar-  
riage.

III. Gifts and grants too, whether express or implied, by a husband to his wife, after marriage, although ordinarily void at Law, will be enforced in Equity if they are of a reasonable nature, and there is no ground to suspect fraud. Thus, gifts made by the husband to the wife to purchase clothes or personal ornaments, or for her separate expenditure, and personal savings and profits made by her in her domestic management which the husband allows her to apply to her own separate use, will be held to vest in her, as against her husband, but not as against his creditors, an unimpeachable right of property therein, so that they may be treated as her separate estate, if such gifts are established by clear and incontrovertible evidence. (St. § 1374, 1375.) If a husband makes presents of chattels to his wife, even verbally, and without words of separate use, her right to them will be enforced against his residuary legatee, if the gift is proved by the testimony of any one who heard him use words of gift, or to whom he afterwards stated that he had given the chattels, or that they were hers. But the Court will not act upon the unsupported oath of the

wife. (*Grant v. Grant*, 34 Beav. 623.) **TIT. V.**  
**824.** **CAP. II.**  
**SEC. I.**

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If a husband places money in a bank in the name of his wife, without any indication that he thereby intends an advancement or gift to her separate use, it will only amount to a contract between him and the bankers that they shall or will honour the cheques of either husband or wife; and the money will remain the property of the husband. (*Lloyd v. Pughe*, L. R. 8 Ch. Ap. 88.)  
**825.**

## SECTION II.

*Pin-money and Paraphernalia.*

TIT. V.  
CAP. II.  
SEC. II.

I. Pin-  
money.

I. Pin-money is not deemed to be an absolute gift; it is not considered like money set apart for the sole and separate use of the wife during coverture; but it is a sum payable by the husband to the wife, in virtue of a particular arrangement, and to be applied by the wife in attiring her person in a manner suitable to the rank of her husband, and in defraying other personal expenses—a sum allowed to save the trouble of a constant recourse by the wife to the husband, in order to meet her ordinary personal expenses. (See St. § 1375 a, and note; 2 Sp. 500, 501.) **826.**

Arrears  
thereof.

Such being the peculiar nature of this provision, the wife cannot make a sweeping disposition of it, as she can of her separate estate. And Courts of Equity refuse to call upon the husband to pay beyond the arrears of a year, although stipulated for by a marriage settlement. For, setting aside the presumed satisfaction by acquiescence, the money is meant to dress the wife during the year, so as to keep up the dignity of the

husband, and not for the purpose of accumulation. And, on the same principle, the personal representatives of the wife are not allowed to make any claim even for arrears of a year. (St. § 1375 a, and note; 2 Sp. 501; 1 Lead. Cas. Eq. 3rd ed. 479.) **827.**

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CAP. II.  
SEC. II.

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II. The wife's paraphernalia are personal apparel and ornaments of the wife, suitable to her rank and condition in life. (St. § 1376.) Old family jewels, though worn by the wife, do not constitute part of her paraphernalia, unless she has acquired them by gift or bequest. (*Jervoise v. Jervoise*, 17 Beav. 566.) **828.**

II. Para-  
phernalia.

At Law, the husband may, in his lifetime, but not by his will, dispose of the wife's paraphernalia, with the exception of necessary apparel. And they are liable to the claims of creditors, with the like exception.

Rule of Law  
respecting  
them.

And if the articles were given by the husband, either before or after marriage, Courts of Equity fully recognise this right of the husband and his creditors, instead of treating the articles as absolute gifts to the wife, as her own separate property; although, in the case of creditors claiming against the assets of the husband, the personal assets of the husband will be marshalled against his representatives in favour of the widow. But

Rule of  
Equity,  
where they  
were given  
by the  
husband,

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SEC. II.

or where  
given by  
any one  
else.

if the articles were bestowed on the wife by any one else, they will be deemed absolute gifts to her separate use; and then, if received with the consent of the husband, neither he nor his creditors can dispose of them. (St. § 1376, 1377; 1 Lead. Cas. Eq. 3rd ed. 480.) **829.**

## SECTION III.

*The Wife's Separate Estate (a).*

I. With regard to the means of acquiring a separate estate—

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CAP. II.  
SEC. III.

1. Whenever real or personal estate is given, granted, devised to, or settled on a woman, either with or without the intervention of trustees, whether after marriage, or as a provision on marriage, or not in contemplation of immediate marriage, and whether by her husband or by a mere stranger, it will be deemed separate estate if it clearly appears that the property was intended for her separate use. (St. § 1380, 1381, 1384; 2 Sp. 502, 507–511; *Goulder v. Camm*, 1 D. F. & J. 146.) Thus, a bequest to a married woman, “for her own use, and at her own disposal,” has been held to be a bequest to her separate use. So money paid to the husband “for the livelihood of the wife” has been construed a gift to her separate use. (St. § 1382; 2 Sp. 07.) But where the expressions do not clearly show that the husband is to be excluded from his marital rights, the wife will

I. Means of  
acquiring it.  
1. By gift,  
grant,  
devise, or  
settlement.

(a) On this subject see *Hulme v. Tenant*, 1 Lead. Cas. 1. 2nd ed. 394 *et seq.*



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SEC. III.

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not take for her separate use. Thus, in the case of a direction to pay money into her own proper hands "for her own use and benefit," it has been held that although the money is to be for her own use, yet there is nothing in that inconsistent with its being subject to the husband's marital rights. (St. § 1383; 2 Sp. 508-511. See also *Spirett v. Willows*, 3 D. J. & S. 293.) And a direct gift to a woman who is either single or will become discoverd on the testator's death, for her sole use and benefit, does not create a separate estate (*Gilbert v. Lewis*, 1 D. J. & S. 38; and see *Lewis v. Mathews*, L. R. 2 Eq. 177), unless aided by other expressions in the will or other circumstances; such as the fact that the instrument shows that the marriage of the person spoken of was contemplated by the author of it. (*In re Tarsey's Trust*, L. R. 1 Eq. 561.) But a gift, by way of trust, for her sole benefit, to a married woman, does create a separate estate (*Green v. Britten*, 1 D. J. & S. 649); and where a precatory trust has been created by will, in favour of children, simpliciter, the trustee may, in execution of the trust, limit the shares of the daughters to their separate use. (*Willis v. Kymer*, L. R. 7 Ch D. 181.) **830.**

2. By the custom of London, a married woman may carry on trade within the City, as a sole trader, and be liable as such. But, independently of any such custom, if it is agreed between the husband and wife, before marriage, that the wife shall be allowed to carry on a separate trade, such an agreement will be maintained at Law, against the husband; and being an agreement for valuable consideration, namely, that of the intended marriage, it will also be maintained at Law against his creditors. And if such an agreement is made after marriage, and trustees are interposed, it will be maintained at Law against the husband; and if it is on valuable consideration, against his creditors also; for, in such case, the wife's trustees will, at Law, be entitled to the property assigned, and to the increase and profits thereof, and she will be considered at Law as their agent, and her possession as their possession. The trustees, however, will be regarded in Equity as holding such property, and receiving the increase and profits thereof, for the sole and separate use of the wife. And thus in such cases where trustees are interposed, the beneficial interest in the property, and the increase and profits thereof, are secured to the wife by the joint operation of Law and Equity. By the

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CAP. II.  
SEC. III.

2. By carrying on a separate trade in London: or even elsewhere, by agreement before marriage;

by agreement after marriage;

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SEC. III.

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even though  
the agree-  
ment be  
merely  
implied.

operation of Law, the legal estate is vest  
in the trustees, and taken out of the pow  
of the husband. By the operation of Equit  
the beneficial interest is vested in, an  
secured to, the wife, against her husband  
and, if the agreement is for valuable con  
sideration, against his creditors also. Bu  
even where there are no trustees interposed,  
such an agreement has the force, in Equity,  
of creating a separate estate for the wife, and  
securing it against the husband; and, if  
the agreement is for valuable consideration,  
against his creditors also. And this is the  
case even though it be a mere implied agree-  
ment. So that if the husband should permit  
his wife, after the marriage, to carry on busi-  
ness on her sole and separate account, all her  
earnings in the trade will be her separate  
property. And if a husband should desert  
his wife, and she should be enabled, by the  
aid of her friends, to carry on a separate  
trade, her earnings in such trade will be  
enforced in Equity against her husband,  
independently of the stat. 20 & 21 Vict.  
c 85, ss. 21, 25. (See St. § 1385-1387;  
2 Sp. 503.) **831.**

3. By an  
order of  
protection,  
or by a  
judicial  
separation.

3. By the stat. 20 & 21 Vict. c. 85, s. 21,  
and 21 & 22 Vict. c. 108, s. 8, if a wife is  
deserted by her husband, she may obtain an

order of protection of her property against her husband and his creditors; and by s. 25 of the former Act, if judicially separated, she is to be deemed a feme sole as regards her property (a); and in case of subsequent cohabitation, it shall be held to her separate use, subject to any agreement. **832.**

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CAP. II.  
SEC. III.

Where the property is vested in trustees, care must be taken that the negotiations are not carried on in the name of the wife, as by taking notes or other securities in her name; for then they will, at Law, be held to belong to the husband, although it will be otherwise in Equity. (St. § 1386.) **833.**

4. By the stat. 33 & 34 Vict. c. 93, it is enacted as follows:—

4. Under the stat. 33 & 34 Vict. c. 93.

“The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate

Earnings of married women to be deemed their own property.

(a) See *In re Insole*, L. R. 1 Eq. 470.

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SEC. III.

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use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property" (s. 1).

### 834.

Deposits in  
savings  
banks by a  
married  
woman.

"Notwithstanding any provision to the contrary in the Act of the 10th year of Geo. IV., chap. 24, enabling the Commissioners for the Reduction of the National Debt to grant life annuities and annuities for terms of years, or in the Acts relating to savings banks and post-office savings banks, any deposit hereafter made and any annuity granted by the said Commissioners under any of the said Acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the Court may, upon an application under sect. 9 of this Act, order such deposit or annuity or any part thereof to be paid to the husband" (s. 2).

reviso.

### 835.

A married  
woman's

"Any married woman, or any woman

about to be married, may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and companies for that purpose, that any sum forming part of the public stocks and funds, and not being less than 20*l.*, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under sect. 9 of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband" (s. 3). **836.**

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property in  
the funds.

"Any married woman, or any woman A married woman's

**TIT. V.** about to be married, may apply in writing  
**CAP. II.** to the directors or managers of any incorpo-  
**SEC. III.** rated or joint-stock company that any fully  
 property in a joint stock company. paid-up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last-mentioned is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under sect. 9 of this Act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband" (s. 4). **837.**

A married woman's property in a society.

"Any married woman, or any woman about to be married, may apply in writing to the committee of management of any in-

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dustrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture, no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under sect. 9 of this Act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband” (s. 5). **838.**



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CAP. II.  
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Deposit of  
moneys in  
fraud of  
creditors  
invalid.

“ Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by savings banks or moneys invested in the funds or in shares or stock of any company shall as against creditors of the husband give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed ” (s. 6). **839.**

Personal  
property  
coming to a  
married  
woman.

“ Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding 200*l.* under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same ” (s. 7). **840.**

Real pro-  
perty com-  
ing to a  
married  
woman.

“ Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her

receipts alone shall be a good discharge for the same " (s. 8). **841.**

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"In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply by summons or motion in a summary way either to the Court of Chancery in England or Ireland according as such property is in England or Ireland, or in England (irrespective of the value of the property) to the judge of the county court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs, as he shall think fit; provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been, and the judge may, if either party so require, hear the application in his private room" (s. 9.) **842.**

How questions as to ownership of property to be settled.

"A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made

Married woman may effect policy of insurance.

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CAP. II.  
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with an unmarried woman " (s. 10, 1st par.).  
**843.**

As to insurance of a husband for benefit of his wife.

" A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county, in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount

equal to the premiums so paid" (s. 10, 2nd par.). **844.**

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"A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property" (s. 11.) **845.**

Married woman may maintain an action.

II. As to the wife's power of disposing of her separate estate, all pre-nuptial agreements for securing to the wife separate personal property, will confer on her, in Equity, unless the contrary is expressly stipulated or implied, the same power of disposing of such separate

II. Wife's power of disposing of separate estate, where it has arisen from a pre-nuptial agreement.

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property, by will or otherwise, as an unmarried woman would have. (St. § 1390 ; 2 Sp. 506, 507.) **846.**

Where it has arisen from a post-nuptial agreement of the husband.

With respect to her power of disposing of her separate property, where no trustee is interposed, and it rests merely on a post-nuptial agreement of the husband, if the property consists of personalty, or an estate for life in real property, her disposal thereof can affect her husband's rights alone ; and therefore his assent is conclusive upon him. And if real property is settled upon her in fee in trust for her separate use, without any special power of appointment, she may dispose of or charge the rents and profits accruing during her life. But it was formerly held that she could only dispose of the inheritance by the ordinary means by which married women dispose of their real property ; because, in regard to real estate, her own heirs are or might be affected in their interest by descent. (St. § 1391 ; 2 Sp. 504, 513 ; and see remarks of V.-C. Kindersley, in *Moore v. Morris*, 4 Drew. 37-8.) **847.**

Where it is given by a third person before or during the coverture.

And where an estate of inheritance is given her by a third person, during the coverture, or as it seems, before coverture, for her separate use, it was formerly held that she could not dispose of it, except by these means (that is,

by a deed duly acknowledged under the Fines and Recoveries Act), or under a power: but that if such a power is expressly given her, she might dispose of the estate, even though there are no trustees interposed. (St. § 1388, 1392; 2 Sp. 504, 507; *Harris v. Mott*, 14 Beav. 169; *Lechmere v. Brotheridge*, 32 Beav. 353.) **848.**

It has been subsequently held, however, that she may, like a feme sole, by virtue of her ownership, dispose, by deed or will, of an estate of inheritance settled to her separate use, even though a special power of appointment be given her. (*Taylor v. Meads*, 34 L. J. (Ch.) 203; *Pride v. Bubb*, L. R. 7 Ch. Ap. 64.) **849.**

Where personal property, whether in possession or reversion, or a life interest in real property, is given by a third person, for the separate use of a married woman, she has, in effect, a full power to dispose of it, unless, from the words of the gift, it appears, beyond a reasonable doubt, to have been the intention of the giver that this absolute power should not exist. (See St. § 1393, 1394; 2 Sp. 513; *Lechmere v. Brotheridge*, 32 Beav. 353.) **850.**

A mere prohibition of alienation or anticipation is void against a man, or a woman

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Restrictions  
against  
alienation  
or anticipa-  
tion.

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while she is unmarried. (See 2 Sp. 520.) And it is void when annexed to a gift of real estate in fee or for life to a woman, even though at the time married, if such gift is not for her separate use. (See 2 Sp. 521.) But a gift, either of real estate, whether in fee or for life, or of personal estate (whether it be of a sum of money, or of a fund producing income), to a woman for her separate use, even though she be unmarried at the time, may be accompanied by restrictions against alienation or anticipation. (St. § 1382 a, 1384; 2 Sp. 511, 521, 522; *In re Crougton's Trusts*, L. R. 8 Ch. D. 460.) These, however, will not be inferred from any ambiguous expressions; they must either be contained in express words or be deducible by plain implication. (See 2 Sp. 512, 522; and remarks of V.-C. Kindersley, in *Moore v Morris*, 4 Drew. 37.) **851.**

Operation of  
separate-use  
clause and  
restriction  
against an-  
ticipation.

The separate-use clause, either with or without a restriction against anticipation, will be confined to the then existing or then intended coverture, or will be also applied to other covertures, according to the apparent intention. (2 Sp. 524; *In re Gaffee*, 1 Mac. & G. 541; *Moore v. Morris*, 4 Drew. 33; *Hawkes v. Hubback*, L. R. 11 Eq. 5.) If it appears to have been intended that every

husband shall be excluded, and that the clause against anticipation shall operate during every successive coverture, in such case, although the woman, while single, or when and as often as she becomes a widow, has the absolute dominion over the property, yet if she do not dispose of the property so as to put an end to the trust, and she marry again, the separate-use clause and the restriction against alienation will be revived during such and every other subsequent coverture, so long as the property is held upon the original trust. (2 Sp. 524.) **852.**

A Court of Equity has no power to release a separate estate from a restraint on anticipation or alienation, even where it would manifestly be for the benefit of the married woman: as where a legacy of considerable amount is given to her on condition that she convey away a separate estate of inconsiderable value. (*Robinson v. Wheelwright*, 21 Beav. 214; 6 D. M. & G. 535.) **853.**

Where the wife bestows her separate property upon her husband, Courts of Equity examine the transaction with an anxious dread of undue marital influence; and if they are required to give sanction or effect to it, they will examine the wife in Court, and adopt other precautions to ascertain

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Gifts to the  
husband by  
the wife.



TIT. V. her unbiassed wishes. (St. § 1395 ; 2 Sp.  
CAP. II. 514.) **854.**  
SEC. III.

Husband's  
receipt of  
the income.

Where the husband, with the consent of the wife, is in the habit of receiving the income of her separate estate, it is regarded as showing her voluntary choice thus to dispose of it for the benefit of the family; and separate money of the wife paid to the husband or placed to his account by her authority or with her concurrence, cannot be recalled. (St. § 1396; 2 Sp. 514; 1 Lead. Cas. Eq. 2nd ed. 411; *Caton v. Rideout*, 1 Mac. & G. 603; *Gardner v. Gardner*, 1 Gif. 126.) And the income of separate estate, where the wife is of unsound mind, will be paid to the husband for her support, if he is unable to maintain her. (2 Sp. 525.) **855.**

III. Lia-  
bility of  
separate  
estate.

III. As to the liability of the wife's separate estate to her contracts, debts, and charges (except under the stat. 20 & 21 Vict. c. 85, s. 26, which relates to women judicially separated), a woman cannot render herself or her property liable, at Law, for any contract, debt, or other charge created by her during the coverture, not even for necessities. But a married woman having separate estate (except so far as she is restrained from anticipation), being considered in

Equity as a feme sole, as regards the separate estate, with respect to the capacity of enjoying it, she is likewise considered as a feme sole with respect to the capacity of charging the estate with debts or engagements. No personal decree, however, can be made against her: the Court can only affect her separate estate in the hands of her trustees: she cannot bind her person at all, or her property generally, but only her separate property. (St. § 1379, and note, and 1400, note; 2 Sp. 324, 325, 504, 515-518; see remarks of Kindersley, V.-C., in *Vaughan v. Vanderstegen*, 2 Drew. 179-184; *Blatchford v. Woolley*, 2 Dr. & Sm. 204.) This will be held liable for all the debts, charges, and incumbrances which she expressly charges, or which, judging from the nature thereof, it may be fairly inferred that she intended, or which she ought to be deemed to have intended, to charge on her separate estate, and for her breaches of trust, except so far as she is prevented by being restrained from anticipation. (*Clive v. Carew*, 1 Johns. & H. 199; and see *Johnson v. Gallagher*, 3 D. F. & J. 494; *In re Leeds Banking Co.*, L. R. 3 Eq. 781; *Picard v. Hine*, L. R. 5 Ch. Ap. 274; *McHenry v. Davies*, L. R. 10 Eq. 88; *London Char-*

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*tered Bank of Australia v. Lemprière, L. R. 4 P. C. 572.*) And hence, if she gives a promissory note, or an acceptance, or a bond to pay her own debt, or if she joins in a bond or note with her husband to pay his debts without reference to her separate estate, it shall be intended as an application *pro tanto* of her separate estate; because the security must have been executed with the intention that it should operate in some way, and it can have no operation except as against her separate estate. And if she employs a lawyer, upon her own responsibility, or an agent to raise money on the credit of her name, her separate estate will be liable, from the nature of the engagement. But it would seem that her separate estate would not be liable for debts of an ordinary character, for which she gives no security, unless, at least, she is divorced or judicially separated from her husband. For she may, and in general must, be presumed to have intended that these should be paid by her husband. If, indeed, the contrary doctrine were held, a wife who has a separate estate would in many cases be disinclined to take upon herself her ordinary domestic duties, fearing lest her separate estate should be exhausted by defraying the ordinary expenses

of the house ; or the creation of a separate estate would often be rendered unavailing, by her encountering that risk. And in no case will the Court charge the *corpus* of the separate estate in respect of her general obligations. (See St. § 1398-1401, and notes ; 2 Sp. 515, 516, and notes ; *McHenry v. Davies*, L. R. 10 Eq. 88 ; *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572 ; *Davies v. Jenkins*, L. R. 6 Ch. D. 728.) It has been held that the separate estate is not liable for the breaches of trust or other torts of the married woman unconnected with such separate estate. But this decision (to say the least) is very questionable. (*Wainford v. Heyl*, L. R. 20 Eq. 321.) A woman's separate estate is liable, after her husband's bankruptcy, to debts incurred by her before her marriage. And so if she gives a written guarantee in consideration of money to be advanced to her husband, to a certain amount, that will be charged on her separate estate, with the plaintiff's costs of an action to enforce it. (*Morrell v. Cowan*, L. R. 6 Ch. D. 166 ; *Chubb v. Stretch*, L. R. 9 Eq. 555.) Unless contrary to the deed of settlement of the company, a married woman may be a shareholder in a joint-stock

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company in her own right, so as to bind her separate estate. (*In re Leeds Banking Co.*, L. R. 3 Eq. 781.) And the savings of property settled to her separate use without power of anticipation, are liable to indemnify a trustee against all calls and liabilities incurred on her behalf, in respect of shares purchased by him at her request, and agreed to be paid for out of her savings. (*Butler v. Cumpston*, L. R. 7 Eq. 16.) **856.**

It was held that where a married woman has a life interest to her separate use, with a general power of appointment by will over the remainder, she does not, by exercising the power, make the remainder applicable to the discharge of such engagements as would bind her separate property, unless she has been guilty of fraud. (*Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Hobday v. Peters* (No. 2), 28 Beav. 354; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Shattock v. Shattock*, L. R. 2 Eq. 182.) But according to other authorities, in such an instance, the appointed property is liable to the appointor's debts, as if it were her separate estate. (See remarks of James, L.J., in *London Chartered Bank of Australia v. L'emprière*, L. R. 4 P. C. 572; *In re Harvey's Estate*, L. R. 13 Ch. D. 216.) **857.**

Where personal property is vested in a woman for her separate use (without any restraint on anticipation), with remainder, as she should by deed or by will appoint, with remainder to her executors or administrators, this is equivalent to an absolute gift to her sole and separate use. (*London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572, 575-6.)

**858.**

By the statute 33 & 34 Vict. c. 93, "a husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried" (s. 12). This enactment extends to property settled to the separate use of a married woman without power of anticipation. (*Sanger v. Sanger*, L. R. 11 Eq. 470.)

**159.**

This enactment has been repealed, so far as respects marriages after the 30th July, 1874, and fresh enactments have been substituted, by the stat. 37 & 38 Vict. c. 50.

**60.**

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Husband's  
liability on  
his wife's  
contracts  
before  
marriage.

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Thus, "so much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt" (s. 1). **861.**

"The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified, and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned" (s. 2). **862.**

"If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs

of defence, whatever the result of the action may be against the wife" (s. 3). **863.**

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"When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife" (s. 4). **864.**

"The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows :

- (1.) The value of the personal estate in possession of the wife, which shall have vested in the husband :
- (2.) The value of the *choses in action* of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession :
- (3.) The value of the chattels real of the wife which shall have vested in the husband and wife :



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- (4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received :
- (5.) The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person :
- (6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors :

Provided that when the husband after marriage pays any debt of his wife, or has a judgment *bond fide* recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable" (s. 5).

**865.**

"This Act may be cited as the 'Married Women's Property Act (1870) Amendment Act, 1874'" (s. 7). **866.**

By the stat. 33 & 34 Vict. c. 93, it is further enacted that—"Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the 33rd sect. of 'The Poor Law Amendment Act, 1868,' they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by such and the same actions and proceedings as money lent" (s. 13). **867.**

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CAP. II.  
SEC. III.

Married  
woman's li-  
ability to the  
parish for  
the mainte-  
nance of her  
husband

"A married woman having separate pro- or children.  
perty shall be subject to all such liability  
for the maintenance of her children as a

**TIT. V.** widow is now by law subject to for the  
**CAP. II.**  
**SEC. III.** maintenance of her children: provided  
----- always, that nothing in this Act shall relieve  
her husband from any liability at present  
imposed upon him by law to maintain her  
children " (s. 14). **868.**

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CAP. II.  
SEC. IV.

## SECTION IV.

*The Wife's Equity to a Settlement or Maintenance out of her own Property (a).*

Except so far as the stat. 33 & 34 Vict. c. 93 (*supra*, Sect. III.), may affect the case, trustees of a married woman's personality not settled to her separate use, may pay it over to her husband before Chancery proceedings are taken in respect of it. But on the other hand, they may refuse to pay it over to him, even at his wife's request, unless he makes a settlement, when the Court would require him to make one. (Hill on Trustees, 409, 410, 415 ; *Re Swan*, 2 Hem. & M. 34.) **869.**

With regard to the cases where the Court requires a settlement, the following propositions may be laid down, subject to the stat. 33 & 34 Vict. c. 93 (*supra*, Sect. III.) **870.**

I. If the wife has real property, or the absolute interest in personal property (with the exception, perhaps, of a term of years), which cannot be reduced into the possession

I. Equity of the wife, when defendant against her husband.

(a) On this subject see *Lady Elibank v. Montolieu, &c.*, 1 Lead. Cas. Eq. 2nd ed. 341 *et seq.*; *Gleaves v. Paine*, 1 D. J. & S. 87.

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of the husband without a suit in Equity (as where the legal property is vested in trustees), and the husband applies to a Court of Equity for the purpose of reducing the property into his possession, the Court, acting upon the maxim that he who seeks equity must do equity, will not give it up to him, without requiring him to make a suitable settlement on the wife, of a part of the property, or of some other property, for her due maintenance in case of her surviving him. (St. § 1404, 1405, 1410, 1418; 2 Sp. 482, 484; *Duncombe v. Greenacre*, 28 Beav. 472; 2 D. F. & J. 509; *Life Association of Scotland v. Siddal*, 3 D. F. & J. 271), with a provision for the issue of the marriage (St. § 1406; 2 Sp. 488), even though the property is under £200 (*In re Cutler*, 14 Beav. 220; *In re Kincaid's Trusts*, 1 Drew. 326), unless the wife and children are already amply provided for under a prior settlement (St. § 1416; *Spicer v. Spicer*, 24 Beav. 365; *Giacometti v. Prodgers*, L. R. 14 Eq. 253; 8 Ch. Ap. 338); or the right to the settlement is waived or lost. (St. § 1418, 1419; *infra*, par. 885.) In the absence of a contract to that effect, an inadequate settlement, even before marriage, of a part of her property, does not deprive her of her right to a settle-

ment out of the residue of her property, though vested in her at the time of the marriage. (*Barrow v. Barrow*, 18 Beav. 529.) **871.**

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This equity of the wife exists in the case of a charge on land for her benefit, even though there be a power of entry and receipt of the rents and profits. For, though there is this remedy at Law for raising the money, the remedy in Equity is more convenient. (*Duncombe v. Greenacre*, 28 Beav. 472; 2 D. F. & J. 509.) **872.**

Before the alterations by the Judicature Act, there were instances in which, for the purpose of enforcing the wife's equity to a settlement, bills in Equity were entertained to restrain the husband from having recourse to his remedy in a Court of Common Law to reduce his wife's *choses in action* into possession. (St. § 1403; 2 Sp. 429.) **873.**

Injunction  
against pro-  
ceedings in  
other  
Courts.

If the husband does not choose to make a settlement or provision for the wife, the Court will not ordinarily take from him the income and interest of his wife's fortune, so long as he is willing to live with and maintain her, and there is no reason for their living apart. Under such circumstances, the Court secures the fund, so as to give her the chance of taking it by survivorship, allowing the hus-

Refusal of  
the husband  
to make a  
settlement.

TIT. V. band, under its order, to receive the income  
 CAP. II. and interest, or a part of it at least. (St. §  
 SEC. IV. 1415 ; see 2 Sp. 490, 491.) **874.**

Indebted-  
 ness of wife  
 on marriage.

Where a woman is indebted at the time of her marriage, she has no equity to a settlement until her debts have been provided for. (*Barnard v. Ford*, L. R. 4 Ch. Ap. 247.) **875.**

II. Equity  
 of the wife,  
 when de-  
 fendant, as  
 against her  
 husband's  
 trustees or  
 vendees.

II. The trustees in bankruptcy or insolvency of a husband, and also his trustees for payment of debts due to his creditors generally, are bound to make a settlement on the wife out of her immediate *choses in action* and immediate absolute equitable interests in chattels personal assigned to them, in the same way, and under the same circumstances, as he would be bound to make one; for it is a general principle that such trustees take the property subject to all the equities which affect the bankrupt or insolvent or general assignor. Such trustees also take the property subject to the wife's right of survivorship, in case the husband dies before the trustees have reduced her *choses in action* and equitable interests into possession. (St. § 1411, 1412 ; 2 Sp. 476.) And even a specific assignee or purchaser from the husband, for valuable consideration, of her *choses in action* and equitable

interests, is bound to make such a settlement. And no assignment of them will convey any right to the assignee or purchaser against the wife, if she survives her husband, and they are not reduced into possession in his lifetime. (St. § 1412 ; 2 Sp. 176; *Scott v. Spashett*, 3 Mac. & G. 604.)

TIT. V.  
CAP. II.  
SEC. IV.

176.

There is this distinction, however, between the case of the husband himself and his specific assignees for valuable consideration, on the one hand, and the case of his trustees in bankruptcy or insolvency, or trustees for payment of debts generally, on the other hand:—in the case of the former, it is only necessary that the provision for the wife should commence from the death of her husband; but in the case of the latter, it is necessary that the provision should commence immediately, because the general assignment of his property renders him incapable for a time, and perhaps for ever, of affording her a suitable support. (St. §

When an immediate provision is required.

11.) **877.**

If the trustees in bankruptcy, or other general assignees claiming title under the husband, refuse to make a settlement on the wife, the like doctrine applies to them as to the husband himself where he refuses

Refusal of the trustees to make a settlement.



TIT. V. to make a settlement. (St. § 1415; *supra*,  
CAP. II. par. 874.) **878.**  
SEC. IV.

Life interest  
in wife's  
personalty.

The husband can sell the life interest of his wife in personalty, and she has no equity to a settlement as against the purchaser. (*Re Duffy's Trust*, 28 Beav. 386.) **879.**

No equity  
out of past  
income.

A wife has no equity to a settlement out of arrears of past income of real or leasehold property, whether against her husband or his particular assignee. (*In re Carr's Trusts*, L. R. 12 Eq. 609.) **880.**

Reversionary  
choses  
in action,  
and rever-  
sionary  
equitable  
interests in  
personal  
chattels.

If the husband assigns his wife's reversionary *choses in action* and other reversionary equitable interests in personal chattels, such assignment will not exclude her right of survivorship, although she join in the assignment; because the assignment, from the nature of the thing, cannot amount to a reduction into possession of such reversionary interest (a). (St. § 1413; 2 Sp. 476.) **881.**

III. Equity  
of the wife,  
when plain-  
tiff, to a set-  
tlement on  
her hus-  
band's  
death, bank-  
ruptcy, or  
insolvency.

III. Whenever the wife, as defendant, would be entitled to an equity for a settlement, out of her equitable interest, against her husband, or against his assignees, she

(a) For an article on the disposition of reversionary interests of married women in chattels personal, by the writer of this Manual, see 10 *Jurist*, 231, 243. But see 2 Sp. 487, and cases there cited. And see stat. 20 & 21 Vict. c. 57.

may assert it, as plaintiff or petitioner. (St. TIT. V.  
CAP. II.  
SEC. IV.  
§ 1414; 2 Sp. 482, 484, 485; *Walker v. Drury*, 17 Beav. 482; *Gleaves v. Paine*, 1 D. J. & S. 87; *Re Ford*, 32 Beav. 621.) **882.**

IV. The Court has a full discretion as to the amount to be settled, according to the circumstances of each case. In the absence, however, of special circumstances, the general rule or the common course has been to settle about one-half on the wife and her children (*Walker v. Drury*, 17 Beav. 482; *Napier v. Napier*, 1 Dru. & W. 410; *Bagshaw v. Winter*, 5 De G. & Sm. 466; *M'Cormick v. Garnett*, 2 Sm. & G. 37; 5 D. M. & G. 278; *Smith v. Smith*, 3 Gif. 121; *Re Grove's Trust*, 3 Gif. 583; 2 Sp. 485; 1 Bright on Husband and Wife, 241), with remainder, in default of issue of the present or any future husband, to the husband, whether he survives the wife or not, or to his assignees. (*Spirett v. Willows*, L. R. 1 Ch. Ap. 520; *In re Suggitt's Trusts*, L. R. 3 Ch. Ap. 215; *Croxtan v. May*, L. R. 9 Eq. 404.) But where particular reasons have occurred, the Court has frequently settled the whole: as in *Taunton v. Morris*, L. R. 11 Ch. D. (Ap.) 779, and in *Marshall v. Fowler*, 16 Beav. 249, where the husband had taken the benefit of the Insolvent Debtors Act, and was moreover almost entirely dependent on

IV. Amount  
to be set-  
tled.

**TIT. V.** charity ; *In re Kincaid's Trusts*, 1 Drew.  
**CAP. II.** 326 ; and *Ward v. Yates*, 1 Drew & Sm. 80,  
**SEC. IV.** where the husband was a bankrupt, and the  
 fund was under £200—so small a sum that  
 it would not have been worth while to have  
 made any settlement at all, unless the whole  
 had been settled ; *In re Cutler*, 14 Beav. 220 ;  
*Watson v. Marshall*, 1 Weekly Reporter, 523 ;  
*Francis v. Brooking*, 19 Beav. 347 ; *Kæber*  
*v. Sturgis*, 22 Beav. 588 ; *Squires v. Ashford*,  
 23 Beav. 132 ; *Duncombe v. Greenacre* (No. 2),  
 29 Beav. 578 ; and *Newman v. Wilson* (No. 2),  
 31 Beav. 34, where the husband was an in-  
 solvent debtor ; in *Scott v. Spashett*, 3 M.  
 & G. 599, where, besides other special circum-  
 stances, the husband had received about  
 double the amount of the wife's property  
 under a previous order, and no settlement  
 had ever been made ; and in *Dunkley v.*  
*Dunkley*, 4 De G. & Sm. 570 ; 2 D. M. & G.  
 390 ; *Vaughan v. Buck*, 1 Sim. (N. S.) 284 ;  
 and *Gent v. Harris*, 10 Hare, 383, where the  
 husband had become bankrupt, and had  
 deserted his wife. **883.**

V. Substi-  
 tute for a  
 settlement,  
 where fund  
 is small.

V. To avoid the expense of a settlement,  
 where the fund belonging to the wife is small,  
 it will sometimes be ordered to be brought  
 into Court, or if already in Court, it will be  
 retained there, and the dividends directed to

be paid to the wife for her life. (*Bagshaw v. Winter*, 5 De G. & Sm. 466 ; *Watson v. Marshall*, 17 Beav. 363 ; *Walker v. Drury*, 17 Beav. 482.) **884.**

TIT. V.  
CAP. II.  
SEC. IV.

VI. The Court will not insist on a settlement on the wife, if at any time before a settlement under the decree is completed, or at least before proposals are made under the decree, the wife (by her consent given in open Court or under a commission) agrees that the absolute fund shall be wholly and absolutely paid over to the husband ; except in the case of a female ward of the Court, who has married without its authority. (St. § 1418 ; 2 Sp. 486, 488.) But until a transfer to the husband has actually been made, the wife can revoke her consent. (*Penfold v. Mould*, L. R. 4 Eq. 562.) **885.**

VI. Wife's  
equity  
waived,

The equity of the wife to a settlement may be lost or suspended by her own misconduct. Thus, if the wife (not being a ward of Court, married without its consent) has been living in adultery, apart from the husband, a Court of Equity will not direct a settlement, on her own application, as it otherwise would ; because, by such misconduct, she has rendered herself unworthy of the protection and favour of the Court. But, on the other hand, in such a case, a Court of Equity will not decree

or lost, or  
suspended

TIT. V.  
CAP. II.  
SEC. IV.

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such equitable property to be paid over to the husband on his application; for when the wife is living apart from him, he is at no charge for her maintenance; and it is only in respect to his duty to maintain her that the Law gives him her fortune. In the case, however, of a female ward of Court, married without its consent, the Court will insist on a settlement, as a punishment to the husband for contempt of its authority. (St. § 1419, and note, and 1419 a; 2 Sp. 486.) And we must be careful to distinguish an application which is grounded merely on general principles of equity, and an application grounded on positive vested rights under a settlement, or under a valid contract for a settlement made before marriage. In the latter case, Courts of Equity cannot refuse to protect or support those vested rights on account of any misconduct in the wife. (St. § 1420.) **886.**

A woman may by her fraud, even though perpetrated by compulsion of her husband, preclude herself from asserting against a purchaser that equity to a settlement which she would otherwise possess. (*In re Lush's Trusts*, L. R. 4 Ch. Ap. 591.) **887.**

Where an executor is indebted to the testator's estate, and unable to pay, he is not

entitled to any part of the assets in right of his wife, and consequently no equity to a settlement of any part of the assets can arise to the wife. (*Knight v. Knight*, L. R. 18 Eq. 487.) **888.**

TIT. V.  
CAP. II.  
SEC. IV.

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We have seen that the Court, in making a settlement on the wife, properly attends to the interests of the children. But it must be observed that the Court attends to their interest only upon the supposition that, in so doing, it is carrying into effect her own desire to provide for her offspring. They have no independent equity of their own; for although the husband is under a moral obligation to provide for them, yet he is not bound to provide for them in any particular way or out of any particular fund. They have only a claim to the consideration of the Court, constituting part of the equity of their mother, and capable of being either expressly given up by her before the amount is ascertained, or tacitly waived by her dying without having asserted it. (See St. § 1417; 2 Sp. 488-492.) And it has been held that if she dies before a decree, even without waiving the right to a settlement, the children cannot assert any claim. (*Wallace v. Auldjo*, 2 Dr. & Sm. 216; 1 D. J. & S. 643.) **889.**

Waiver of  
provision  
for the  
children.

TIT. V.  
CAP. II.  
SEC. IV.

VII. No equity to a settlement, where parties are domiciled in Scotland.

VII. By the law of Scotland, a married woman has no equity to a settlement ; and if husband and wife are domiciled in Scotland, she has no equity to a settlement (*M'Cormick v. Garnett*, 5 D. M. & G. 278) even out of the produce of real estate in England directed to be sold. (*Hitchcock v. Clendinen*, 12 Beav. 534.) **890.**

VIII. Equity of the wife to a maintenance in case of the husband's misconduct, or bankruptcy, or insolvency.

VIII. Although Courts of Equity do not claim any general jurisdiction to decree a suitable maintenance for the wife, out of her husband's property, where he has deserted or ill-treated her, yet, whenever the wife has any equitable property, even though it be only for her life, within the reach of the jurisdiction of Courts of Equity, and the husband has deserted or ill-treated or refused to maintain her, they will decree a suitable and immediate maintenance out of such equitable property, or, if it has passed into the possession of a *bond fide* purchaser without notice, out of other property of the husband ; because the obligation of maintaining the wife is the ground on which the Law gives the property to the husband. (St. § 1408 p, 1408, note, 1422-1424, 1426.) And where the wife has an equitable interest for life only, and the husband is a bankrupt or insolvent, and therefore is, as a general rule,

deprived, for a time at least, of the means of  
duly maintaining her, she is entitled to an  
allowance for maintenance out of such life  
interest, as against the trustees. (St. § 1408 n,  
1412.) But a married woman, even though  
her husband does not maintain her, is not  
entitled, as against a particular assignee for  
valuable consideration of the husband, to an  
allowance for maintenance out of the income  
of real or personal estate to which she is  
entitled in Equity, for her life only ; because,  
if she were, purchasers would be involved in  
inquiries respecting the relations between  
husband and wife, and their other property  
and sources of maintenance ; and the life  
interests of married women would become  
incapable of being dealt with, whatever might  
be the exigencies of the case. (*Tidd v. Lister*,  
10 Hare, 151, 153 ; 3 D. M. & G. 857.) **891.**

TIT. V.  
CAP. II.  
SEC. IV.

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## SECTION V.

*Some Miscellaneous Points (a).*

TIT. V.      As a deed of separation cannot dissolve the  
CAP. II.      marriage, it does not relieve the wife from  
SEC. V.      any of the ordinary disabilities of coverture.  
Deeds of separation. (St. § 1428.) **892.**

A deed of separation entered into between the husband and wife alone, without the intervention of trustees, is utterly void. (St. § 1428.) **893.**

A covenant for separation, whether immediate or future, is void. But the Court may compel parties, in pursuance of articles of separation entered into between them, to execute a formal deed of separation, *quantum valeat*, unless in the meantime they agree to live together. And it would seem that if a deed for immediate, and not for future, separation contains a covenant by the husband to maintain his wife, and a covenant by the trustees to exonerate him from any debts contracted for her maintenance, such covenant will be enforced, so long as the separation lasts;

(a) See 2 Lead. Cas. Eq. 2nd ed. 713—717 *et seq.*

but it will not be enforced for a longer period, even as to past separation. (St. § 1428; 2 Sp. 528; *Wilson v. Wilson*, 1 H. L. Cas. 538; 5 H. L. Cas. 51, 61, 62.) **894.**

TIT. V.  
CAP. II.  
SEC. V.

A contract in a separation deed cannot affect the property of the wife, if not settled to her separate use, or reduced into possession during the coverture. (2 Sp. 532.) **895.**

The Court will interfere to prevent the doing of any personal acts, which, if done, would be in violation of an agreement respecting property entered into on the separation. And where, by articles of separation, it is agreed that the husband shall permit his wife to live separate, and as if unmarried, without any molestation, interference, or annoyance whatever, and that a proper deed shall be executed for effectuating the object of the articles, and containing all such covenants, &c., as shall be deemed expedient for that purpose, this justifies the insertion in the deed of a covenant that the husband will not compel, or endeavour to compel, the wife, by legal proceedings or otherwise, to cohabit or live with him. And such a covenant may be enforced by action or injunction. And similar remarks apply to the opposite case of an agreement by the wife to permit the

**TIT. V.** husband to live separate. (2 Sp. 532;  
**CAP. II.**  
**SEC. V.** *Wilson v. Wilson*, 1 H. L. Cas. 538 ; 5 H. L. Cas. 40, 51, 52, 60-63, 71, 72 ; *Sanders v. Rodway*, 16 Beav. 207 ; and see remarks of V.-C. Wood, in *Stocker v. Wedderburn*, 3 K. & J. 403 ; *Hunt v. Hunt*, 31 Beav. 89 ; 4 D. F. & J. 221 ; *Gibbs v. Harding*, L. R. 8 Eq. 490 ; 5 Ch. Ap. 336 ; *Besant v. Wood*, L. R. 12 Ch. D. 605.) **896.**

Reconciliation puts an end to a deed of separation, as it must not be permitted to parties to make agreements for themselves to hold good whenever they choose to live separate. (2 Sp. 532.) **897.**

If a wife induces her husband to execute a deed of separation, in contemplation by her of her renewal of an illicit intercourse, the deed is void. (*Evans v. Carrington*, 2 D. F. & J. 481.) **898.**

Non-disclosure of ante-nuptial incontinence.

Non-disclosure of ante-nuptial incontinence on the part of a wife is not such a fraud upon the husband as to entitle him to set aside a settlement made upon the marriage. (*Evans v. Carrington*, 2 D. F. & J. 481.) **899.**

Benefits under settlement not forfeited by adultery.

The Court has no jurisdiction to deprive an adulteress, whose marriage has been dissolved, of any benefit under the settlement made upon the marriage. (*Evans v.*

*Carrington*, 2 D. F. & J. 481; *Fitzgerald* TIT. V.  
CAP. II.  
SEC. V.  
v. *Chapman*, L. R. 1 Ch. D. 563.) **900.**

Where a married woman contracts and Purchase.  
pays for real estate without the knowledge  
of her husband, but for his benefit, such a  
purchase is binding when ratified by the  
husband. (*Millard v. Harvey*. 34 Beav.  
237.) **901.**

A woman, although married, cannot, by Fraud.  
fraud, obtain for herself or those claiming  
under her any benefit or interest, to the  
detriment of any other person. (V.-C. Wood,  
in *Nicholl v. Jones*, L. R. 3 Eq. 709.) **902.**

And if husband and wife mortgage the  
wife's real estate, and represent to the mort-  
gagee that there is no settlement, and the  
mortgagee has no notice that there is a  
settlement, the wife is bound by the repre-  
sentation, and the mortgagee is protected.  
(*Sharpe v. Foy*, L. R. 4 Ch. Ap. 35.) **903.**

Where a wife is deserted by her husband, Money ad-  
vanced for  
support of a  
deserted  
wife.  
and a person advances money to her for her  
support, and it is applied for that purpose,  
he can, in Equity, compel the husband to  
repay him the money. (*Deare v. Soutten*,  
L. R. 9 Eq. 151.) **904.**

30 & 31 VICT. CAP. XLVIII.

An Act for amending the Law of  
Auctions of Estates.

[15th July, 1867.]

BE it enacted and declared by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title.

1. This Act may be cited for all purposes as the Sale of Land by Auction Act, 1867.

Commencement of Act.

2. This Act shall commence and take effect on the first day of *August*, 1867.

Interpretation of terms.

3. "Auctioneer" shall mean any person selling by public auction any land, whether in lots or otherwise :

"Land" shall mean any interest in any

*Sale of Land by Auction.*

messuages, lands, tenements, or hereditaments, of whatever tenure :

“Agent” shall mean the solicitor, steward, or land agent of the seller :

“Puffer” shall mean a person appointed to bid on the part of the owner.

4. And whereas there is at present a conflict between Her Majesty's Courts of Law and Equity in respect to the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the Courts of Law holding that all such sales are absolutely illegal, and the Courts of Equity under some circumstances giving effect to them, but even in Courts of Equity the rule is unsettled : And whereas it is expedient that an end should be put to such conflicting and unsettled opinions : Be it therefore enacted, that from and after the passing of this Act whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at Law.

Where sales are invalid in law to be also invalid in equity.

5. And whereas as sales of land by auction are now conducted many of such sales are

Rule respecting sale without reserve, &c.

*Sale of Land by Auction.*

illegal, and could not be enforced against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both parties: Be it therefore enacted by the authority aforesaid as follows: That the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person (a).

Rule respecting sale subject to right of seller to bid as he may think proper.

6. And where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper.

(a) In *Gilliat v. Gilliat*, L. R. 9 Eq. 60, it was held that it is illegal to employ a person to bid up to the reserved bid, unless the right to do so is expressly stipulated for.

*Sale of Land by Auction.*

7. And whereas it is the long settled practice of Courts of Equity in sales by auction of land under their authority to open biddings even more than once, and much inconvenience has arisen from such practice, and it is expedient that the Courts of Equity should no longer have the power to open biddings after sales by auction of land under their authority: Be it further enacted by the authority aforesaid, that the practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery shall, from and after the time appointed for the commencement of this Act, be discontinued, and the highest *bond fide* bidder at such sale, provided he shall have bid a sum equal to or higher than the reserved price (if any), shall be declared and allowed the purchaser, unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or Judge before the Chief Clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being

Practice of opening biddings, by order of Chancery, except on ground of fraud, to be discontinued.



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*Sale of Land by Auction.*

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the purchaser, and order the land to be re-sold under such terms as to costs or otherwise as the Court or Judge shall think fit.

Court of  
Chancery,  
&c., in other  
respects  
excepted  
from operation  
of Act.

8. Except as aforesaid, nothing in this Act contained shall affect any sale of land made under or by virtue of any order of the High Court of Chancery in *England*, of the High Court of Chancery in *Ireland*, or of the Landed Estates Court there, or of the Court of Chancery in the County Palatine of *Lancaster*, or of any County or other Court having jurisdiction in Equity.

Not to  
extend to  
Scotland.

9. This Act shall not extend to *Scotland*.

31 & 32 VICT. CAP. XL.

An Act to amend the Law relating to  
Partition.

[25th June, 1868.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as The Partition Short title.  
Act, 1868.

2. In this Act the term "the Court" means As to the term "the Court."  
the Court of Chancery in *England*, the Court of Chancery in *Ireland*, the Landed Estates Court in *Ireland*, and the Court of Chancery of the County Palatine of *Lancaster*, within their respective jurisdictions.

3. In a suit for partition, where, if this Power to Court to order sale instead of division.  
Act had not been passed, a decree for par-

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*Partition.*

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tition might have been made, then if it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

Sale on application of certain proportion of parties interested.

4. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court

*Partition.*

shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

5. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions.

As to purchase of share of party desiring sale

6. On any sale under this Act the Court may, if it thinks fit, allow any of the parties

Authority for parties interested to bid.

*Partition.*

interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same, or as to any other matters, as to the Court seem reasonable.

Application  
of Trustee  
Act.  
(13 & 14  
Vict. c. 60.)

7. Section Thirty of The Trustee Act, 1850, shall extend and apply to cases where, in suits for partition, the Court directs a sale instead of a division of the property.

Application  
of proceeds  
of sale.  
(19 & 20  
Vict. c. 120.)

8. Sections Twenty-three to Twenty-five (both inclusive) of the Act of the session of the nineteenth and twentieth years of Her Majesty's reign (Chapter One hundred and twenty), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to money to be received on any sale effected under the authority of this Act.

Parties to  
partition  
suits.

9. Any person who, if this Act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object

*Partition.*

for want of parties; and at the hearing of the cause the Court may direct such enquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the Court to add to the decree or order.

10. In a suit for partition the Court may make such order as it thinks just respecting costs up to the time of the hearing.

Costs in partition suits.

11. Sections Nine, Ten, and Eleven of the Chancery Amendment Act, 1858, relative to the making of general orders, shall have effect as if they were repeated in this Act,

As to general orders under this Act. (21 & 22 Vict. c. 27.)

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*Partition.*

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and in terms made applicable to the purposes thereof.

Jurisdiction  
of County  
Courts in  
partition.  
(28 & 29  
Vict. c. 99.)

12. In *England* the County Courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this Act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by Section One of the County Courts Act, 1865.

39 & 40 VICT. CAP. XVII.

An Act to amend the Partition Act,  
1868.

[27th June, 1876.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as the Partition Short title.  
Act, 1876, and shall be read as one with the  
Partition Act, 1868.

2. This Act shall apply to actions pending Application  
of Act.  
at the time of the passing of this Act as  
well as to actions commenced after the pass-  
ing thereof, and the term "action" includes  
a suit, and the term "judgment" includes  
decree or order.

3. Where in an action for partition it Power to  
dispense



*Partition.*

with service  
of notice of  
decree or  
order in  
special  
cases.

appears to the Court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the Court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the Court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the Judge in Chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the Court (including persons under any disability), shall be bound by the proceedings in the action as if on the day

*Partition.*

of the date of the order dispensing with service they have been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the Court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the Court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.

4. When an order is made under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the Court, the following provisions shall have effect :

*Proceedings  
where  
service is  
dispensed  
with.*

- (1.) The proceeds of sale shall be paid into Court to abide the further order of the Court :
- (2.) The Court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time :
- (3.) The Court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted

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*Partition.*

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for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made :

- (4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the Court shall distribute the proceeds in accordance with the rights of those persons :
- (5.) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accor-

*Partition.*

dance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservations (if any) as to the Court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the Court to have any *prima facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

6. Where in an action for partition two or more sales are made, if any person who has been excluded from the proceeds by virtue of this Act been excluded from the proceeds, he may recover from any participating person any portion received by him of the share of the excluded person.

Provision  
for case of  
successive  
sales in  
same action.

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*Partition.*

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participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.

Request by  
married  
woman,  
infant, or  
person  
under  
disability.

6. In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such disability, but the Court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit.

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*Partition.*

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7. For the purposes of the Partition Act, 1868, and of this Act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

Action for partition to include action for sale and distribution of the proceeds.

36 & 37 VICT. CAP. 66.

The Supreme Court of Judicature Act,  
1873.

SECTION 24.

Law and  
equity to be  
concur-  
rently ad-  
ministered.

IN every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the Rules following :—

(1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or

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*The Supreme Court of Judicature Act, 1873.*

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proceeding for the same or the like purpose properly instituted before the passing of this Act.

(2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.

(3.) The said Courts respectively, and every judge thereof, shall also have power



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*The Supreme Court of Judicature Act, 1873.*

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to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed, or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief related to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in ordinary way by such defendant.

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*The Supreme Court of Judicature Act, 1873.*

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(4.) The said Courts. respectively, and every judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.

(5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or

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*The Supreme Court of Judicature Act, 1873.*

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matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

(6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom, or created by any statute, in the same manner as the same would have been recognised and given effect

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*The Supreme Court of Judicature Act, 1873.*

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to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice.

(7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

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*The Supreme Court of Judicature Act, 1873.*

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## SECTION 25.

Rules of law  
upon certain  
points.

And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned; Be it enacted as follows :—

Administra-  
tion of assets  
of insolvent  
estates.

(1.) [By the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77, s. 10), an enactment is made in lieu of this 1st subsection; for which see *supra*, par. 472.]

Statutes of  
Limitation  
inapplicable  
to express  
trusts.

(2.) No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

Equitable  
waste.

(3.) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the

*The Supreme Court of Judicature Act, 1873.*

description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

(4.) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

(5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

Suits for possession of land by mortgagors.

(6.) Any absolute assignment, by writing under the hand of the assignor (not pur-

Assignment of debts and choses in action.

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*The Supreme Court of Judicature Act, 1873.*

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porting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity

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*The Supreme Court of Judicature Act, 1873.*

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with the provisions of the Acts for the relief of trustees.

(7.) Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.

Stipulation  
not of the  
essence of  
contracts.

(8.) A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or other-

Injunctions  
and re-  
ceivers.



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*The Supreme Court of Judicature Act, 1873.*

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wise, or (if out of possession) does or does not claim the right to do the act sought to be restrained under any colour or title, and whether the estates claimed by both or by either of the parties are legal or equitable.

Damages by collisions at sea.

(9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

Infants.

(10.) In questions relating to the custody and education of infants the Rules of Equity shall prevail.

Cases of conflict not enumerated.

(11.) Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.

*The Supreme Court of Judicature Act, 1873.*

## SECTION 89.

Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

Powers of  
inferior  
Courts  
having  
Equity and  
Admiralty  
jurisdiction

## SECTION 90.

Where in any proceeding before any such inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy

Counter-  
claims in  
inferior  
Courts, and  
transfers  
therefrom.

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*The Supreme Court of Judicature Act, 1873.*

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so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: Provided always, that in such case it shall be lawful for the High Court, or any Division or judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any Division thereof; and in such case the record in such proceeding shall be transmitted by the Registrar, or other proper officer, of the inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

## SECTION 91.

Rules of law  
to apply to  
inferior  
Courts.

The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such Courts.

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